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In the Supreme Court of the United States

OCTOBER TERM, 1954

JOHN P. PETERS, PETTTIONER

v.

OVETA CULP HOBBY, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR RESPONDENTS

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OVETA CULP HOBBY, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR RESPONDENTS

OPINIONS BELOW

The judgment of the United States District Court for the District of Columbia was entered without opinion (R. 25). The judgment of the Court of Appeals for the District of Columbia Circuit was also entered without opinion (R. 28).

JURISDICTION

The judgment of the Court of Appeals was entered on August 5, 1954 (R. 28). The petition for a writ of certiorari was filed on September 29, 1954, and was granted on November 15, 1954 (R. 29). The jurisdiction of this Court rests upon 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

Petitioner was removed under Executive Order 9835, as amended, from his "temporary part-time or intermittent" federal employment as a "Special Consultant * * * on a when-and-as employed basis, with compensation at a specified per diem rate for days actually employed" after a finding of reasonable doubt as to his loyalty to the Government of the United States. The questions presented by his removal are as follows:

1. Whether petitioner's removal from the federal service complied with the procedural requirements of Executive Order 9835, as amended by Executive Order 10241.

2. Whether Executive Order 9835, as amended by Executive Order 10241, was constitutional.[1]

EXECUTIVE ORDERS INVOLVED

Executive Order 9835 (12 F. R. 1935) and Executive Order 10241 (16 F. R. 3690) are set forth in full in the Appendix, *infra*.

STATEMENT

In this action, petitioner seeks a declaratory judgment that he was improperly removed from his position as a Special Consultant to the Public Health Service in the Department of Health, Education and Welfare, and an order directing

[1] This question is framed in the past tense in view of the fact that Executive Order 9835, as amended, was revoked and superseded in April, 1953, by Executive Order 10450 (18 F. R. 2489). See *infra*, p. 15.

his reinstatement (R. 13). His removal was effected under Executive Order 9835, as amended by Executive Order 10241, after a finding of reasonable doubt as to his loyalty to the Government of the United States (R. 8). Upon the authority of its prior decision in *Bailey* v. *Richardson*, 182 F. 2d 46, affirmed by an equally divided court, 341 U. S. 918, the court below affirmed the entry of judgment on the pleadings for respondents. The provisions of the Executive Orders, the administrative action leading to petitioner's separation, and the judicial proceedings below are as follows:

1. THE EXECUTIVE ORDERS

a. *Executive Order 9835.*—Executive Order 9835 was issued by the President on March 21, 1947, "by virtue of the authority vested in me by the Constitution and statutes of the United States, including the Civil Service Act of 1883 (22 Stat. 403), as amended, and section 9A of the act approved August 2, 1939 (18 U. S. C. 61i), and as President and Chief Executive of the United States". It recites that "each employee of the Government of the United States is endowed with a measure of trusteeship over the democratic processes which are the heart and sinew of the United States;" that "it is of vital importance that persons employed in the Federal service be of complete and unswerving loyalty to the United States"; that "the presence within

the Government service of any disloyal or subversive person constitutes a threat to our democratic processes;" and that "maximum protection must be afforded the United States against infiltration of disloyal persons into the ranks of its employees, and equal protection from unfounded accusations of disloyalty must be afforded the loyal employees of the Government." To achieve these ends the Executive Order was promulgated "in the interest of the internal management of the Government".

Part I of the Order directs a loyalty investigation of every person entering the civilian employment of any department or agency of the Executive branch of the government (Section 1). The investigation may be conducted after the person enters upon actual employment but in such case his appointment is conditioned upon a favorable determination with respect to his loyalty (Section 2). Provision is made as to the sources of information to be consulted and as to the circumstances in which a full field investigation is to be conducted (Sections 3, 4).

Part II of the Order relates to investigation and removal of existing employees. It provides that the head of each department and agency "shall be personally responsible for an effective program to assure that disloyal civilian officers or employees are not retained in employment in his department or agency" (Section 1). It

directs the appointment within the department or agency of loyalty boards having the function of making recommendations with respect to removals on grounds relating to loyalty. It provides that any person charged with disloyalty shall have a right to an administrative hearing before such a loyalty board and may appear before the board personally, accompanied by counsel or representative of his own choosing, and present evidence on his own behalf. It further provides that written notice of such a hearing shall be given and that the employee shall be informed of the nature of the charges against him in sufficient detail to enable him to prepare his defense. "The charges shall be stated as specifically and completely as, in the discretion of the employing department or agency, security considerations permit." The employee is to be informed of his right to reply to such charges, and his rights to a hearing at which he may appear and present evidence (Section 2). A recommendation of removal by a loyalty board is subject to appeal to the head of the employing department or agency or persons designated by him. The decision of the department or agency head is in turn subject to appeal to the Loyalty Review Board of the Civil Service Commission for an advisory recommendation (Section 3). The order expressly provides that these rights of hearing, notice and appeal are to be accorded to

every officer or employee "irrespective of tenure, or of manner, method, or nature of appointment" (Section 4).

Part III provides for the establishment in the Civil Service Commission of a Loyalty Review Board. The Board is authorized to review cases involving persons recommended for dismissal on grounds relating to loyalty which may be referred to it either by the employing department or agency or the officer or employee concerned, and to make advisory recommendations thereon to the head of the employing department or agency. It is also empowered to make rules and regulations relating to employee loyalty, to advise departments and agencies on loyalty problems, to coordinate their loyalty policies and procedures and to disseminate information, make reports and submit recommendations relating to the loyalty program (Section 1). An index of all persons on whom loyalty investigations have been made since September 1, 1939 is to be maintained (Section 2). The Attorney General is directed to furnish the Board with a list of organizations found by him to fall within certain categories (see p. 8 *infra*) and the Board is directed to disseminate that information to all departments and agencies (Section 3).

Part IV provides that an investigative agency shall make available on request to the head of any department or agency all information con-

cerning any employee or prospective employee (Section 1). It further provides, however, that:

> the investigative agency may refuse to disclose the names of confidential informants, provided it furnishes sufficient information about such informants on the basis of which the requesting department or agency can make an adequate evaluation of the information furnished by them, and provided it advises the requested department or agency in writing that it is essential to the protection of the informants or to the investigation of other cases that the identity of the informants not be revealed [Section 2].

Part V prescribes the standard for refusal of employment or removal from employment. The controlling standard was that "on all the evidence, reasonable grounds exist for belief that the person involved is disloyal to the Government of the United States" (Section 1). As a guide in the application of this test the order specifies certain activities and associations of an applicant or employee "which may be considered in connection with the determination of disloyalty." These activities include—

> *a.* Sabotage, espionage, or attempts or preparations therefor, or knowingly associating with spies or saboteurs;
>
> *b.* Treason or sedition or advocacy thereof:

plicable standard was that prescribed by Executive Order 9835, as amended by Executive Order 10241 (R. 20). The Chairman declined to specify where the burden of proof lay but declared that the panel would reach its own conclusion upon all the evidence as to whether there was a reasonable doubt of petitioner's loyalty (R. 19, 20).

Petitioner testified again in his own behalf. He denied membership in the Communist Party, discussed his political beliefs and his motives for engaging in the activities and associations which were the subject of the charges, and answered all questions put to him by the panel (R. 20–21). Five witnesses also testified in his behalf. Three of them—Ex-President Charles W. Seymour of Yale University, C. M. Hugh Long, former dean of the Yale Medical School, and Circuit Judge Charles E. Clark—had testified at the previous hearing (R. 8, 21). Each of the five witnesses stated his acquaintance with petitioner over a period of several years and his firm conviction of petitioner's loyalty (R. 21).

In addition to the evidence adduced by petitioner's counsel, the record before the panel contained information supplied by informants whose identity was not disclosed to petitioner (R. 20, 21). The identity of one or more, but not all, of these informants was known to the panel (R. 20). The panel expressly declined the request of petitioner's counsel to reveal the identity of the in-

formant who had given information relating to Charge No. 1 (R. 20).

By letter dated May 22, 1953, Bingham advised petitioner that the panel had determined that "on all the evidence, there is a reasonable doubt as to Dr. Peter's loyalty to the Government of the United States" (R. 8). The letter further stated that respondent Oveta Culp Hobby, the Secretary of the Department of Health, Education and Welfare, had been notified of the Loyalty Review Board's finding and recommendation that petitioner be removed from his position (R. 8). In addition, the letter informed petitioner that, pursuant to Civil Service Rule V, Section 5.101 (a) (5 C. F. R. (1954 Supp.) 5.101 (a)),[4] he had

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[4] "§ 5.101 *Persons disqualified for appointment.* (a) Persons disqualified for any of the reasons stated under Civil Service Rule II, § 2.104 (a) (1) through (8) of this chapter, may, in the discretion of the Commission, be denied examination, or be denied any of the types of appointment listed in Civil Service Rule II, § 2.112 (a) (1) through (7) of this chapter, namely, original probational, reappointment, reinstatement, temporary appointment, inter-agency transfer, conversion from excepted, war service indefinite or temporary indefinite appointment to competitive appointment, and indefinite appointments under Parts 2, 7, and 8 of this chapter, for a period of not more than 3 years from the date of the determination of such disqualification: *Provided*, That no person shall be admitted to competitive examination, nor shall he be employed in any position in the competitive service within 3 years after a final determination that he is disqualified for Federal employment because of a reasonable doubt as to his loyalty to the Government of the United States."

been barred from the federal service for a period of three years from May 18, 1953, and that any and all pending applications or eligibilities were therewith cancelled (R. 21, 22).

On June 12, 1953, the Surgeon General of the Public Health Service notified petitioner of his separation from his position as a Special Consultant, effective June 12, 1953 (R. 21). On June 15, 1953, respondent Hobby denied petitioner's request that the transcript of the hearings be remanded to the Loyalty Review Board to permit the filing of a motion for rehearing before the full Board (R. 22). On September 25, 1953, Nelson A. Rockefeller, Under Secretary of the Department of Health, Education, and Welfare, advised petitioner's counsel that respondent Hobby had given due consideration to petitioner's case, that a discussion with counsel would not seem to be of assistance, but that if counsel desired to submit a brief on legal or procedural questions, it would be received and considered (R. 22).

3. PROCEEDINGS BELOW

On February 18, 1954, petitioner brought this action for injunctive and declaratory relief against the Secretary of the Department of Health, Education, and Welfare, the members of the Civil Service Commission, and the members of the panel of the Loyalty Review Board who had heard his case (R. 2–14). Petitioner sought a declaratory judgment that he had been im-

properly removed from his position and is entitled to reinstatement; an order directing his reinstatement; an order directing the members of the Commission to expunge from its record the finding of the Loyalty Review Board panel that there was reasonable doubt as to his loyalty to the Government of the United States; and an order directing the members of the Commission to expunge from its record the ruling that petitioner has been barred from federal service for a period of three years from May 18, 1953 (R. 13–14).

The complaint alleged that the procedure followed in effecting his removal did not comply in several respects with the requirements of Executive Order 9835, as amended by Executive Order 10241 (R. 9–12), and that the actions taken by respondents were unconstitutional in that they deprived petitioner of liberty and property without due process of law, violated his right of freedom of speech and opinion, and contravened the prohibition against Bills of Attainder and *ex post facto* laws (R. 12–13).

After respondents had filed their answer, petitioner moved for judgment on the pleadings (R. 23–24). In turn, respondents cross-moved for judgment on the pleadings (R. 24–25).[5] The

[5] In part, respondents' motion pointed out that the cause is moot as to respondents Hessey, Amen, and King since the Loyalty Review Board is no longer in existence, having been abolished by Executive Order 10450. See *supra*, p. 15.

district court denied petitioner's motion, granted respondents' motion, and entered judgment on the pleadings for respondents (R. 25). On appeal, the cause was presented to the court below on petitioner's motion to enter judgment on the merits without formal briefs or argument. The parties agreed that this action presented the same issues decided by that court in *Bailey* v. *Richardson,* 182 F. 2d 46, affirmed by an equally divided court, 341 U. S. 918. Feeling "obliged to follow the ruling in that case in the determination of the present case," the court below granted petitioner's motion for the entry of judgment without formal briefs or argument and affirmed the judgment entered for respondents by the district court (R. 28).

SUMMARY OF ARGUMENT

As we understand petitioner's position, petitioner does not question the necessity for the utilization of personnel security measures in the Executive Branch nor the constitutional authority of the President to adopt some form of personnel security program. Rather, petitioner's complaint is that the specific measures devised by the President—if construed to have authorized the procedure followed herein—are unconstitutional. As in *Galvan* v. *Press,* 347 U. S. 522, petitioner's contentions must be assessed in the light of history.

I

A. From the beginning of our constitutional history, the appointment to and removal from federal office has always been regarded as a matter for Executive discretion. The courts have construed Acts of Congress as limiting the Executive power of removal only where such a limitation was imposed by clear and express language. Where such a limitation was found to exist, judicial inquiry has been restricted to the question of compliance with statutory requirements. In the absence of legislative or administrative limitations, the courts have held that appointments and dismissals present no justiciable issue. This doctrine has been based on the reluctance of the courts to interfere with the Executive Branch in the performance of its constitutional function, and on the view that, except as Congress may otherwise provide, Government employees hold office only at the pleasure of their superior.

B. This record of some one hundred-and-sixty years speaks with great force. Never in our history has it been thought that a Government employee could not be dismissed without a hearing which meets the procedural requirements of the Fifth Amendment. Indeed, legislative enactments restricting the grounds for dismissal have never purported to require such a hearing. Employees have been dismissed for such offences as acceptance of bribes, theft of Government docu-

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ments and attempts at seduction by force without such a hearing. And petitioner concedes that no constitutional issues would be raised by the complete repeal of all civil service protection of Government employees. (Pet. Br. 15). Petitioner's contention that dismissal for disloyalty is in a different category is without merit. His reliance on *United States* v. *Lovett,* 328 U. S. 303, in this connection is misplaced. The subsequent decisions of this Court in *United Public Workers* v. *Mitchell,* 330 U. S. 75, *American Communications Assn.* v. *Douds,* 339 U. S. 382, and *Garner* v. *Board of Public Works of Los Angeles,* 341 U. S. 716, establish that the *Lovett* case does not prevent general regulation of the qualifications for federal office or require a judicial or quasi-judicial hearing in cases of dismissal for failure to meet those qualifications.

Wieman v. *Updegraff,* 344 U. S. 183, is similarly distinguishable. Nothing in that decision suggests that the legislature or the Executive lacks power to prescribe reasonable qualifications for federal employment or to dismiss those who fail to satisfy such qualifications. In particular, it is implicit in the Court's opinion in that case that loyalty to the Government of the United States is a reasonable qualification for public employment. Further, the vice found in the Oklahoma statute there involved, *i. e.* indiscriminate classification of innocent with knowing ac-

tivity, is not present here. To the contrary, the terms of the Executive Order and the implementing regulations demonstrate that, on this score, the Order is comparable to the statutes which were upheld by this court in *Garner* v. *Board of Public Works, supra, Adler* v. *Board of Education,* 342 U. S. 485, and *Gerende* v. *Board of Supervisors,* 341 U. S. 56, as fixing reasonable qualifications for public office.

Insofar as petitioner has been injured by the "stigma" to his reputation, we see no basis for holding that that stigma is a thing apart, which gives rise to constitutional rights not applicable to other dismissals from Government service. In comparable fields, this Court has held that equivalent individual interests may validly be invaded without a due process hearing. Cf. *United States* v. *Nugent,* 346 U. S. 1; *Shaughnessy* v. *Mezei,* 345 U. S. 206; *Knauff* v. *Shaughnessy,* 338 U. S. 537. Of particular importance here, the Court held in those cases that, in view of the plenary character of the power in question, Executive action may constitutionally be based on confidential information. We submit that the plenary power of the Executive over the tenure of employees is no less firmly embedded in the tissues of our body politic and that the Due Process Clause is no less inapplicable.

Assuming, *arguendo,* however, that *Wieman* v. *Updegraff, supra,* must be read as holding that

c. Advocacy of revolution or force or violence to alter the constitutional form of government of the United States;

d. Intentional, unauthorized disclosure to any person, under circumstances which may indicate disloyalty to the United States, of documents or information of a confidential or non-public character obtained by the person making the disclosure as a result of his employment by the Government of the United States;

e. Performing or attempting to perform his duties, or otherwise acting, so as to serve the interests of another government in preference to the interests of the United States;

f. Membership in, affiliation with or sympathetic association with any foreign or domestic organization, association, movement, group or combination of persons, designated by the Attorney General as totalitarian, fascist, communist, or subversive, or as having adopted a policy of advocating or approving the commission of acts of force or violence to deny other persons their rights under the Constitution of the United States, or as seeking to alter the form of government of the United States by unconstitutional means.

Part VI directs each department and agency to submit to the Federal Bureau of Investigation names of all its incumbent employees. The Bureau is to check such names against its records

and to notify each department and agency of those persons as to whom there is substantial evidence of activities or associations coming within the categories enumerated above. Upon receipt of such information the department or agency shall make or cause to be made such investigation of those employees as the head of the department or agency shall deem advisable (Section 1). Additional provisions are made with respect to the handling and transmission of confidential documents and information (Section 2). The Order is not to be applicable to persons summarily removed under the provisions of any statute conferring the power of summary removal (Section 3).

b. *Executive Order 10241.*—On April 28, 1951, Section 1 of Part V of Executive Order 9835—the standard for refusal of employment or removal from employment—was amended by Executive Order 10241. As amended, the standard to be applied was whether "on all the evidence, there is a reasonable doubt as to the loyalty of the person involved to the Government of the United States." The amended standard readopted, in substance, the standard which had been in effect throughout World War II, *i. e.*, War Service Regulation II, Section 3 (issued by the Civil Service Commission in 1942, 7 F. R. 7723, 5 CFR (Cum. Supp.) 18.2 (c)), which had provided that an applicant may be denied ap-

pointment if there is "a reasonable doubt as to his loyalty to the Government of the United States." See *Friedman* v. *Schwellenbach,* 159 F. 2d 22 (C. A. D. C.), certiorari denied, 330 U. S. 838.

2. ADMINISTRATIVE ACTION LEADING TO PETITIONER'S REMOVAL

Petitioner is a professor of medicine at Yale University (R. 15). Because of his eminence in the field of medical science, he had been employed for several years prior to 1953 as a "Special Consultant in the Public Health Service, Department of Health, Education and Welfare, on a when-and-as employed basis, with compensation at a specified per diem rate for days actually employed" (R. 27). At the time of his removal, he was serving under an appointment tendered on August 21, 1951, for a term expiring December 31, 1953 (R. 16). His duties in the capacity of Special Consultant required his presence in Washington for four to ten days each year to advise the Surgeon General with respect to proposals to grant federal assistance to medical research institutions under the Public Health Laws (R. 3, 15, 27). In accordance with Civil Service regulations pertaining to "temporary part-time or intermittent employment for consultation purposes," petitioner did not have com-

petitive status and was not in the classified civil service (R. 27).[2]

By letter dated January 7, 1949, Joseph E. McElvain, Chairman of the Board of Inquiry on Employee Loyalty of the Federal Security Agency,[3] informed petitioner that information re-

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[2] In Respondents' Memorandum in Opposition, it was suggested that the present case did not warrant further review for the reason that, *inter alia*, petitioner's "status is far different from that of the mass of federal employees" (p. 4). Petitioner's Reply Memorandum states (p. 2, n. 2): "At the risk of quarrelling over numbers, we might point out that of the 2,344,383 paid civilian employees in the executive branch of the Federal Government on June 30, 1953, only 1,014,017—or 43% of them—were covered by the Classification Act of 1949, 5 U. S. C. §§ 1071 *et seq.*, 63 Stat. 964, as amended. Pay Structure of the Federal Civil Service, June 30, 1953, Civil Service Commission Pamphlet 33–5, p. 19 (September 1954)". While petitioner's statement is statistically correct, it is wholly misleading and not responsive to respondents' observation. The number of employees covered by the Classification Act of 1949 for salary purposes and the number of employees in the classified civil service are two separate and distinct matters. In fact, of the 2,156,124 civilian employees in the executive branch in August 1954, 1,948,805—or approximately 90% of them—were in the competitive service. See U. S. Civil Service Commission, *Federal Employment Statistical Bulletin*, August 1954, Table 3, p. 4; see also U. S. Civil Service Commission, *Graphic Presentation on Federal Employment*, November 1954, pp. 4, 10, 11.

[3] Prior to April 10, 1953, the functions of the Department of Health, Education, and Welfare were performed by the Federal Security Agency. On that date, pursuant to Reorganization Plan No. 1 of 1953 and P. L. 13, 83d Cong., 1st Sess. (67 Stat. 18), the Federal Security Agency was designated as the Department of Health, Education, and Welfare.

lating to his loyalty had been received and enclosed an interrogatory relating thereto (R. 4). The interrogatory specified particular acts and associations of petitioner with specified organizations, movements and meetings (R. 16). Petitioner answered this communication under oath on January 17, 1949 (R. 4). On or about February 18, 1949, McElvain advised petitioner that it had been determined that no reasonable grounds existed for belief that petitioner was disloyal to the Government of the United States—the standard prescribed by Executive Order 9835 (R. 4).

As noted above, p. 9, on April 28, 1951, the standard prescribed by Executive Order 9835 was amended by Executive Order 10241. On May 21, 1951, L. V. Meloy, Executive Secretary of the Loyalty Review Board advised McElvain that petitioner's case should be reopened and readjudicated pursuant to Executive Order 10241 (R. 16). Subsequently, on August 17, 1951, Burton L. French, Acting Chairman of the Loyalty Review Board, informed McElvain that a panel of the Board had considered the complete file in petitioner's case, had concluded that the derogatory material contained in the file was too serious to justify adjudication of the case on the basis of the interrogatory, and therefore recommended that a letter of charges be issued to petitioner and a hearing held thereon (R. 17).

Pursuant to this recommendation and to the receipt of new information bearing on petitioner's loyalty (R. 17), a letter of charges was sent to petitioner by McElvain on December 17, 1951 (R. 4). Sixteen charges were specified, relating to purported membership in the Communist Party, sponsorship of certain petitions, affiliation with certain organizations, and alleged association with members of, and sympathizers with, the Communist Party (R. 4). The letter advised petitioner that he might answer the charges in writing within ten days and that he had a right to an administrative hearing at which he might present evidence in his behalf (R. 4).

Petitioner replied under oath to the letter of charges on December 26, 1951 (R. 4). On March 13, 1952, McElvain transmitted to petitioner's counsel a written statement of certain information in the possession of the Federal Security Agency's Board of Inquiry on Employee Loyalty as to the particular acts and associations of petitioner with specified organizations, movements and meetings. The statement noted that certain of these items of information had been received from confidential informants (R. 17–18).

On April 1 and 2, 1952, the Federal Security Agency's Board of Inquiry on Employee Loyalty conducted a hearing in New Haven, Connecticut (R. 5, 18). The hearing was attended by peti-

tioner in person and by his counsel (R. 18). The Chairman of the Board advised petitioner that the charges which had been served would not be considered as evidence (R. 18). The sources of the information as to the facts bearing on the charges were not identified or made available to petitioner's counsel for cross examination. The identity of one or more of the informants furnishing the information, but not of all the informants, was known to the Board (R. 18). The Board did not know whether the information given by a confidential informant as to the facts bearing on Charge No. 1 had been given under oath (R. 18).

At the hearing, petitioner testified under oath that he had never been a member of the Communist Party and also testified with respect to the other charges (R. 19). He did not refuse to answer any question directed to him (R. 19). Eighteen witnesses who were called by petitioner also testified, and petitioner submitted affidavits, letters or statements by some forty additional persons (R. 19). No witness testified that petitioner was disloyal (R. 18).

By letter dated May 23, 1952, from McElvain, petitioner was notified that the Board of Inquiry had determined that, on all the evidence, there was no reasonable doubt as to petitioner's loyalty to the Government of the United States—the standard established by Executive Order 10241 (R. 5–6).

Thereafter, on April 6, 1953, pursuant to Regulation 14 of the Loyalty Review Board, Hiram Bingham, Chairman of the Loyalty Review Board, informed petitioner that that Board had determined to conduct a post-audit of the action of the Board of Inquiry and, to this end, "hold a hearing and reach its own decision" (R. 6).

On April 27, 1953, Executive Order 9835, as amended by Executive Order 10241, was revoked and superseded by Executive Order 10450 (18 F. R. 2489), effective May 27, 1953. Section 11 of the new Order provided that cases pending before the Loyalty Review Board on the effective date of the Order were to be heard to final determination in accordance with the provisions of Executive Order 9835, as amended. For this purpose, Section 12 of the new Order provided that the Loyalty Review Board was to continue and function for a period of one hundred and twenty days from the effective date of the Order.

Pursuant to this authority, on May 12, 1953, a panel of the Loyalty Review Board, composed of respondents John H. Hessey, Sr., John H. Amen, and Willard L. King, conducted a hearing in New Haven, Connecticut (R. 6). At the hearing, the Chairman of the panel advised petitioner's counsel that Charge No. 9, which had been dismissed in the previous hearing, would not be considered (R. 19); that the record in the previous hearing would be made a part of the evidence of record in the present hearing (R. 19, 20); and that the ap-

ment of inferior federal officers (Constitution, Art. II, Sec. 2), may validly limit it by general legislation. *Myers* v. *United States*, 272 U. S. 52.

The fundamental nature of that power, and the extreme reluctance of the courts to permit any restriction on it, are illustrated by the cases involving the validity and extent of attempted legislative regulations. While it is established that Congress has some power to regulate the terms and conditions of employment of inferior federal officers (*United States* v. *Perkins*, 116 U. S. 483), the courts in construing and applying such legislation have repeatedly stressed the importance of preserving the executive prerogative unimpaired, and have insisted that that prerogative can be limited, if at all, only by the most express language. Thus, in *Parsons* v. *United States*, 167 U. S. 324, a statutory provision of a four year term of office was held not to oust the President's power of removal before the end of that term. In *Shurtleff* v. *United States*, 189 U. S. 311, a statutory provision for removal from office for inefficiency, negligence of duty or malfeasance in office was held not to preclude a removal without notice or hearing and for no assigned cause. Finally, in *Myers* v. *United States*, 272 U. S. 52, this Court, while recognizing the power of Congress to regulate removals of departmental employees, held that Congress was without constitutional power to limit the Presi-

dent's "unrestricted power of removal" (272 U. S. at 176) of officers appointed by the President with the consent of the Senate.[9]

These cases deal with conflicts between the legislature and the executive over the removal power—a problem not presented here since petitioner does not, and cannot, contend that the tenure of his employment was governed by any Act of Congress.[10] They are significant however, as demonstrating clearly the scope of the executive power of removal and the reluctance of the courts to countenance interference with that power.

In the absence of legislative restraint upon the executive's discretionary power to remove inferior government officers and employees, the courts have consistently refused, since the founding of

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[9] The limitations placed on this decision by *Humphrey's Executor* v. *United States*, 295 U. S. 602, with respect to legislative power over independent regulatory commissions are irrelevant for present purposes.

[10] As noted in the Statement, *supra*, pp. 10–11, petitioner did not have competitive status and was not in the classified civil service (R. 27). Accordingly, the Lloyd-LaFollette Act (37 Stat. 555) which applies only to persons "in the classified civil service" (5 U. S. C. 652) has no application. Similarly, although the complaint is silent as to petitioner's possible service in the Armed Forces, the Veterans' Preference Act of 1944 (58 Stat. 387) is equally inapplicable. That Act affords protection only to "permanent or indefinite" employees (5 U. S. C. 863), and it is conceded that petitioner was engaged in "temporary part-time or intermittent employment" (R. 27).

the Republic, to supervise the action of executive officials. Where Congress has specified the grounds of removal and prescribed certain procedures, the function of the judiciary has been held to be exhausted upon a determination that the mandate of Congress has been complied with. At no time have the courts intervened to review the basis for executive action or to substitute their judgment for that of the officials. *Eberlein* v. *United States*, 257 U. S. 82; *Burnap* v. *United States*, 252 U. S. 512; *Brown* v. *Lane*, 232 U. S. 598; *Reagan* v. *United States*, 182 U. S. 419; *Keim* v. *United States*, 177 U. S. 290; *White* v. *Berry*, 171 U. S. 366; *Crenshaw* v. *United States*, 134 U. S. 99; *In re Sawyer*, 124 U. S. 200; *Matter of Hennen*, 13 Peters 230; *United States* v. *Guthrie*, 17 How. 284.[11]

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[11] For illustrative cases subsequent to the *Bailey* case, *supra*, see also *Williams* v. *Cravens*, 210 F. 2d 874 (C. A. D. C.); *Kohlberg* v. *Gray*, 207 F. 2d 35 (C. A. D. C.), certiorari denied, 346 U. S. 937; *Blackmon* v. *Lee*, 205 F. 2d 13 (C. A. D. C.); *Terry* v. *Stevens*, 203 F. 2d 219 (C. A. D. C.); *Watson* v. *Pace*, 201 F. 2d 713 (C. A. D. C.), affirming 101 F. Supp. 477 (D. D. C.); *Kirkpatrick* v. *Gray*, 198 F. 2d 533 (C. A. D. C.), certiorari denied *sub nom. Priestly* v. *Donaldson*, 344 U. S. 880; *Powell* v. *Brannan*, 196 F. 2d 871 (C. A. D. C.); *Deviny* v. *Campbell*, 194 F. 2d 876 (C. A. D. C.), certiorari denied, 344 U. S. 826; *Ciaffone* v. *United States*, 126 C. Cls. 532; *McNulty* v. *United States*, 126 C. Cls. 573; *Engelhardt* v. *United States*, 125 C. Cls. 603; *Palmer* v. *United States*, 121 C. Cls. 415; *Blum* v. *United States*, 120 C. Cls. 232; *Love* v. *United States*, 119 C. Cls. 486, certiorari denied, 342 U. S. 866; *Croghan* v. *United*

Such non-intervention in the field of personnel administration is, of course, merely one application of the long-recognized principle that "the interference of the courts with the performance of the ordinary duties of the executive departments of the government, would be productive of

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States, 116 C. Cls. 577; *Dupre* v. *United States*, 116 C. Cls. 660.

For earlier precedents, see also *Carter* v. *Forrestal*, 175 F. 2d 364 (C. A. D. C.); *Levy* v. *Woods*, 171 F. 2d 145 (C. A. D. C.); *Friedman* v. *Schwellenbach*, 159 F. 2d 22 (C. A. D. C.), certiorari denied, 330 U. S. 838, rehearing denied, 331 U. S. 865; *Siskind* v. *Morgenthau*, 152 F. 2d 286 (C. A. D. C.); *Maghan* v. *Board of Commissioners of the District of Columbia*, 141 F. 2d 274 (C. A. D. C.); *Hammond* v. *Hull*, 131 F. 2d 23 (C. A. D. C.), certiorari denied, 318 U. S. 777; *Levine* v. *Farley*, 107 F. 2d 186 (C. A. D. C.), certiorari denied, 308 U. S. 622; *United States ex rel. Palmer* v. *Lamp*, 244 Fed. 377 (C. A. 6); *United States ex rel. Anderson* v. *Simon*, 269 Fed. 715 (C. A. D. C.); *United States ex rel. Nalle* v. *Hoover*, 31 App. D. C. 311; *United States ex rel. Taylor* v. *Taft*, 24 App. D. C. 95, writ of error dismissed, 203 U. S. 461; *Page* v. *Moffett*, 85 Fed. 38 (C. C. D. N. J.); *Morgan* v. *Nunn*, 84 Fed. 551 (C. C. M. D. Tenn.); *Flemming* v. *Stahl*, 83 Fed. 940 (C. C. W. D. Ark.); *Carr* v. *Gordon*, 82 Fed. 373 (C. C. N. D. Ill.); *Asher* v. *Forrestal*, 71 F. Supp. 470 (D. D. C.); *Waterman* v. *Somervell*, 34 F. Supp. 695 (S. D. N. Y.), certiorari denied, 317 U. S. 630, rehearing denied, 317 U. S. 710, 318 U. S. 798, 320 U. S. 214; *Block* v. *Sassaman*, 26 F. Supp. 105 (D. Minn.); *Gadsden* v. *United States*, 111 C. Cls. 487; *Ginn* v. *United States*, 110 C. Cls. 637; *Weinstein* v. *United States*, 109 C. Cls. 579; *Culligan* v. *United States*, 107 C. Cls. 222, certiorari denied, 330 U. S. 848; *Kent* v. *United States*, 105 C. Cls. 280; *Bratton* v. *United States*, 90 C. Cls. 604; *Bennett* v. *United States*, 89 C. Cls. 322; *Golding* v. *United States*, 78 C. Cls. 682, certiorari denied, 292 U. S. 643; *Kellom* v. *United States*, 55 C. Cls. 174; *Lellmann* v. *United States*, 37 C. Cls. 128.

nothing but mischief; and * * * that such a power was never intended to be given to them." *Decatur* v. *Paulding,* 14 Pet. 497, 516.[12] The executive and legislative branches of the Government are constitutionally responsible for the ability, integrity and loyalty of the personnel of the executive branch. That responsibility of necessity comprehends the power to remove those not qualified. No function is more internal to the executive branch than the selection and retention or dismissal of its employees.[13] As the court

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[12] See also *Gaines* v. *Thompson*, 7 Wall. 347; *Litchfield* v. *Register and Receiver*, 9 Wall. 575, 577; *Carrick* v. *Lamar*, 116 U. S. 423, 426; *Riverside Oil Co.* v. *Hitchcock*, 190 U. S. 316, 324; *West* v. *Hitchcock*, 205 U. S. 80, 85; *Ness* v. *Fisher*, 223 U. S. 683, 691–692; *Alaska Smokeless Coal Co.* v. *Lane*, 250 U. S. 549, 555; *Hall* v. *Payne*, 254 U. S. 343, 347; *Work* v. *Rives*, 267 U. S. 175, 183; *Wilbur* v. *United States*, 281 U. S. 206, 218; *I. C. C.* v. *New York, N. H. & H. R. Co.*, 287 U. S. 178, 203; *United States ex rel. Chicago Gt. Western R. R.* v. *I. C. C.*, 294 U. S. 50, 62; *United States ex rel. Girard Co.* v. *Helvering*, 301 U. S. 540, 543; *Adams* v. *Nagle*, 303 U. S. 532, 542; *Perkins* v. *Lukens Steel Co.*, 310 U. S. 113, 131–132; *United States Graphite Co.* v. *Sawyer*, 176 F. 2d 868 (C. A. D. C.), certiorari denied, 339 U. S. 904.

[13] "The framers of our Constitution had one essential feature of efficient government clearly in mind. They gave to the Executive officer charged in law with the responsibility and actually charged by the people with the responsibility of carrying on the Executive department of the government, the power and means of meeting that responsibility. They vested in him complete power to appoint all the officers of the government who were subordinate to him, and upon whose political capacity and governmental discretion would depend the wise carrying out of his policies. They gave him the power of absolute removal, and they placed in his hands

below succinctly observed in the *Bailey* case, *supra,* "the judiciary cannot assume responsibility for the sufficiency of the qualifications of executive employees without assuming corresponding responsibility for the conduct of executive affairs. It has no such power." (182 F. 2d at 62.)

The inappropriateness of judicial inquiry into the ground of removal of a public officer or employee is further manifested by the nature of public office. It has been held repeatedly that the appointment to and the tenure in public office are not contract or property rights. *Taylor and Marshall* v. *Beckham,* 178 U. S. 548; *Crenshow* v. *United States,* 134 U. S. 99; *In re Sawyer,* 124 U. S. 200; *Butler* v. *Pennsylvania,* 10 How. 402; see 2 Cooley, *Constitutional Limitations* (8th ed. 1927) 746, n. 1. As this Court early declared (*Matter of Hennen,* 13 Pet. 230, 258):

> All offices, the tenure of which is not fixed by the constitution, or limited by law, must be held either during good behavior, or (which is the same thing in contemplation of law), during the life of the incumbent; or must be held at the will and discretion of some department of the govern-

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the control of the action of all those who took part in the discharge of the political duties of the executive department. They acted on a sound political principle * * *." Taft, *Our Chief Magistrate and His Powers* (1916), p. 76.

> ment, and subject to removal at pleasure. It cannot, for a moment, be admitted that it was the intention of the constitution, that those offices which are denominated inferior offices should be held during life. And if removable at pleasure, by whom is such removal to be made? In the absence of all constitutional provision or statutory regulation, it would seem to be a sound and necessary rule, to consider the power of removal as incident to the power of appointment.

In light of these considerations, it is readily apparent why this Court early announced that, if the office is held at the discretion of the appointing authority, "this court can have no control over the appointment or removal, nor entertain any inquiry into the grounds of removal. If the [appointing authority] is chargeable with any abuse of his power, this is not the tribunal to which he is amenable; * * *." *Matter of Hennen, supra,* at 261.

Although the advent of Civil Service laws and regulations have, to some extent, limited executive discretion over removal, judicial abstention from interference with those acts within the scope of exeeutive discretion has been uniformly affirmed. Thus, the courts have intervened to enforce compliance with specific procedural steps required by law and regulations. *United States* v. *Wickersham,* 201 U. S. 390; *Mulligan* v. *Andrews,* 211 F. 2d 28 (C. A. D. C.); *Manning* v.

Stevens, 208 F. 2d 827 (C. A. D. C.); *Money* v. *Anderson,* 208 F. 2d 34 (C. A. D. C.); *Kutcher* v. *Gray,* 199 F. 2d 783 (C. A. D. C.); *Deak* v. *Pace,* 185 F. 2d 997 (C. A. D. C.); *Borak* v. *Biddle,* 141 F. 2d 278 (C. A. D. C.), certiorari denied, 323 U. S. 738; *Stringer* v. *United States,* 117 C. Cls. 30; *Wittner* v. *United States,* 110 C. Cls. 231; *Elchibegoff* v. *United States,* 106 C. Cls. 541, certiorari granted, 329 U. S. 704, writ dismissed, 329 U. S. 694. Where, however, such procedural steps have been taken, judicial inquiry into the basis for or propriety of removal has been consistently refused. See cases cited *supra,* pp. 34–35.

Thus, in *Keim* v. *United States,* 177 U. S. 290, where an employee had been discharged as inefficient, this Court refused to consider the contention that his discharge was "without just cause" and that at the time of his discharge he was an efficient clerk who had "discharged his duties faithfully and efficiently" and possessed "the necessary business capacity for the proper discharge of the duties of said clerkship," stating (p. 296):

> These are matters peculiarly within the province of those who are in charge of and superintending the departments, and until Congress by some special and direct legislation makes provision to the contrary, we are clear that they must be settled by those administrative officers.

dismissals on loyalty grounds are subject to the requirements of procedural due process, we submit that the procedures followed here fully meet those requirements. It is well settled that due process is not a technical conception with a fixed content unrelated to time, place and circumstances. In essence, the problem is one of balancing the conflicting individual and national interests involved. In the instant situation, national security demands that certain types of information be kept confidential and that the employee be denied confrontation and cross-examination of confidential informants. Balancing the conflicting interests involved, we submit that due process does not compel the Government to choose between disclosure and retention of employees as to whose loyalty there is a reasonable doubt.

C. Petitioner's assertion that the Executive Order invades rights guaranteed under the First Amendment is similarly without substance. Like measures have been taken in every other time of national crisis presenting issues of possible disloyalty in the federal service. Moreover, the consistent practice over much of our history has been to base appointments to and dismissals from the federal service primarily on political opinions—a practice which was never thought to present any constitutional issue or other justiciable question. Assuming, however, that a justiciable question is

presented under the First Amendment, we think it clear that the Order is valid under the principles announced in *Adler* v. *Board of Education, supra, Garner* v. *Board of Public Works, supra, Gerende* v. *Board of Supervisors, supra,* and *United Public Workers* v. *Mitchell, supra.*

II

Petitioner's contention that the procedure here followed was inconsistent with the terms of the Executive Order is also without foundation. He asserts that the use in that Order of the words, "hearing" and "evidence" presupposes a judicial or quasi-judicial hearing and that because he was not allowed to confront the confidential informants on whose information the loyalty boards relied, he was denied such a hearing. The Order, however, contemplated that in many cases the decision would turn on information which considerations of national security required to be kept confidential and not disclosed to the affected employee. It accordingly expressly provided for such disclosure as was consistent with national security. Further, the rights of employees were explicitly defined in the Order. An employee had the right to appear personally, to be accompanied by counsel of his choosing, and to present evidence on his behalf, by witnesses or affidavit. No other rights normally incident to a judicial or quasi-judicial hearing were specified. And such

other rights could not have been conferred consistently with the Presidential mandate that the identity of confidential informants be kept secret.

ARGUMENT

INTRODUCTORY STATEMENT

This is the most recent of a series of cases which have come before this Court involving the validity of various aspects of Executive Order 9835, which, as noted in our memorandum in opposition, was revoked and superseded in April 1953, by Executive Order 10450 (18 F. R. 2489). *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U. S. 123,[6] involved the application of those provisions of the Order which called upon the Attorney General to designate, for the guidance of the Loyalty Review Board and the heads of departments and agencies in determining the suitability of individuals for federal employment, those organizations found by the Attorney General to come within certain categories prescribed by the Order. *Bailey* v. *Richardson*, 341 U. S. 918,[7] involved the application of those provisions of the Order which directed the refusal to hire, or the dismissal of, federal employees as to whom it was found, in accordance with procedures estab-

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[6] Together with Nos. 7 and 71, October Term, 1950, *National Council of American-Soviet Friendship, Inc.* v. *McGrath*, and *International Workers Order, Inc.* v. *McGrath*.

[7] Together with *Washington* v. *McGrath*, 341 U. S. 923.

lished by the Order, that there was reasonable doubt of loyalty to the United States.

By reason of this Court's division of opinion in those cases, the constitutional issues therein raised were not finally resolved by this Court. The present case raises the identical issues presented in the *Bailey* case. Petitioner here, as did petitioner in the *Bailey* case, asserts that the procedure followed in effecting his dismissal was in conflict with the provisions of Executive Order 9835; that the Order, as applied, violated rights to procedural due process guaranteed by the Fifth Amendment; that it violated rights of free speech and assembly guaranteed by the First Amendment; and that it violated the constitutional prohibitions against Bills of Attainder and *ex post facto* laws (R. 9–13).

As we understand petitioner's position, petitioner does not question the necessity for the utilization of personnel security measures in the Executive Branch nor the constitutional authority of the President to adopt some form of personnel security program. Rather, petitioner's complaint is that the specific measures devised by the President—if construed to have authorized the procedure followed herein—are unconstitutional.

In this posture, we think it unnecessary to rehearse in this brief the detailed statement set forth at pp. 24–55 of the Brief for Respondents in the *Bailey* case (No. 49, October Term, 1950)

with respect to the circumstances leading to the promulgation of Executive Order 9835. Suffice it to say, not merely two ideologies but two adverse forces presently coexist. And it is by now obvious that infiltration of government service is an established technique of the world communist conspiracy for the overthrow of Government.[8] In the circumstances, there can be no doubt of the reasonable basis for the executive judgment that our government must protect itself against the presence within the federal service of any person as to whom there is a reasonable doubt of loyalty to the United States. See *infra,* pp. 83–87.

Turning then to the specific measures adopted by the President to insure the security of the United States and reversing the order in which petitioner has presented his objections thereto, we shall discuss first his attacks upon the constitutionality of Executive Order 9835, as amended, and shall consider in Part II of this brief his contention that the particular procedure followed in this case was in conflict with requirements of the Order.

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[8] See *e. g., Interlocking Subversion in Government Departments,* Report of the Subcommittee to Investigate the Administration of the Internal Security Act and Other Internal Security Laws to the Committee on the Judiciary, United States Senate, 83d Cong., 1st Sess., July 30, 1953.

I

PETITIONER'S CONTENTIONS AS TO THE UNCONSTITUTIONALITY OF EXECUTIVE ORDER 9835, AS AMENDED, ARE WITHOUT MERIT

In *Galvan* v. *Press*, 347 U. S. 522, this Court upheld the constitutionality of Section 22 of the Internal Security Act of 1950, providing for the deportation of any alien who has been a member of the Communist Party at any time after entry, as applied to a resident alien shown to have been willingly a member of the Communist Party from 1944 to 1946 although not shown to have been aware of its advocacy of violent overthrow of the Government. In reaching that result, the Court observed that "much could be said for the view, were we writing on a clean slate, that the Due Process Clause qualifies the scope of political discretion heretofore recognized as belonging to Congress in regulating the entry and deportation of aliens. And since the intrinsic consequences of deportation are so close to punishment for crime, it might fairly be said also that the *ex post facto* Clause, even though applicable only to punitive legislation, should be applied to deportation" (*id.* at 530–531).

The Court pointed out, however, that "the slate is not clean. As to the extent of the power of Congress under review, there is not merely 'a page of history,' *New York Trust Co.* v. *Eisner*, 256 U. S. 345, 349, but a whole volume. Policies

pertaining to the entry of aliens and their right to remain here are peculiarly concerned with the political conduct of government. * * * that the formulation of these policies is entrusted exclusively to Congress has become about as firmly imbedded in the legislative and judicial tissues of our body politic as any aspect of our government. And whatever might have been said at an earlier date for applying the *ex post facto* Clause, it has been the unbroken rule of this Court that it has no application to deportation" (*id.* at 531).

These observations are, we believe equally compelling here. Much can be said for petitioner's view, were the slate clean, that the scope of political discretion vested in the Executive and in the Congress by the Constitution in regulating the appointment and tenure of federal employees is narrowly circumscribed by constitutional prohibitions. But here, as in the *Galvan* case, the slate is not clean. The scope of the executive power challenged by petitioner bears the impressive gloss of not just a page of history but the record of some one hundred-and-sixty years, the writing of which has been shared by all three branches of our Government.

Although petitioner seeks to raise a broad range of constitutional issues, the nature of his action is not novel. As we shall show, its disposition is controlled by the familiar principle, estab-

lished in countless cases involving removal of federal officers and employees, that such a removal is an executive act over which the courts have no general revisory power. Since "'the judicial Power' with which alone this Court is invested comes into operation only as to issues that the long tradition of our history has made appropriate for disposition by judges" (Frankfurter J., concurring in *American Communications Assn.* v. *Douds*, 339 U. S. 382, 416) we turn first to a consideration of the traditional scope of judicial action in this field.

A. THE APPOINTMENT AND REMOVAL OF GOVERNMENT EMPLOYEES IS A MATTER OF EXECUTIVE DISCRETION WHICH IS SUBJECT TO JUDICIAL REVIEW ONLY FOR COMPLIANCE WITH APPLICABLE STATUTES OR REGULATIONS

From the beginning of our constitutional history, it has been settled that questions of tenure of office are basically not judicial questions, except as Congress may impose statutory requirements which become judically enforcible. Responsibility for the quality of government officers and employees is vested by the Constitution in the executive and legislative branches. Art. II, Secs. 2, 3. In particular, it has been settled since the debates in the first Congress that the President has a discretionary power of removal, derived from the nature of his executive office, which is unrestricted except as Congress, in the exercise of its power to provide for the appoint-

> fact being punished for past actions; whereas in this case they are subject to possible loss of position only because there is substantial ground for the congressional judgment that their beliefs and loyalties will be transformed into *future* conduct. Of course, the history of the past conduct is the foundation for the judgment as to what the future conduct is likely to be; but that does not alter the conclusion that § 9 (h) is intended to prevent future action rather than to punish past action.

These distinctions were further elaborated upon in *Garner* v. *Board of Public Works of Los Angeles*, 341 U. S. 716. The Court there pointed out that "punishment is a prerequisite" of a bill of attainder and that "[w]hether legislative action curtailing a privilege previously enjoyed amounts to punishment depends upon 'the circumstances attending and the causes of the deprivation'" (*id.* at 722). It concluded that punishment is not imposed "by a general regulation which merely provides standards of qualification and eligibility for employment" (*ibid*).

The Court's observations in the *Douds* and *Garner* cases are precisely applicable here. Petitioner was dismissed from his employment because it was the considered judgment of the President that beliefs, associations and activities such as the Loyalty Review Board concluded he possessed rendered an employee unqualified for public office. His dismissal was preventative, not

punitive. The loyalty program was instituted because the President had substantial reason to believe that government employees who came within the categories prescribed in Executive Order 9835 constituted a potential threat to our system of Government. It did not purport to punish past conduct; it looked to a present condition—whether there "is" reasonable doubt of an employee's loyalty—as a basis for predicting the likelihood of future conduct which the President had every right to forestall.

Further, the ruling of the Loyalty Review Board barring petitioner from public office for a period of three years was not imposed upon him in this particular case as a matter of individual adjudication. To the contrary, as in the *Garner* case, it was imposed by "a general regulation which merely provides standards of qualification and eligibility for employment" (341 U. S. at 722). At the time of petitioner's current appointment in August, 1951, Civil Service Rule V, § 5.101 (a), which had been issued in April, 1950, expressly provided that "persons disqualified for any of the reasons stated under Civil Service Rule II, § 2.104 (a) (1) through (8) * * * may, in the discretion of the Commission, be denied examination, or * * * appointment * * * for a period of not more than three years from the date of the determination of such disqualification" (15 F. R. 2239). And one "of the reasons

stated under Civil Service Rule II" was disqualification under Executive Order 9835. 5 CFR 2.104 (a) (7). Subsequently, in September, 1952, prior to petitioner's removal under the Executive Order, ineligibility for a three-year period was made mandatory, rather than discretionary, under Civil Service Commission Rule V. 17 F. R. 8565, 5 CFR (1954 Supp.) 5.101 (a). In these circumstances, the *Lovett* case, as explained by this Court in the *Garner* and *Douds* cases, plainly has no applicability here.

3. Formulating his argument somewhat differently, petitioner further argues, citing *Wieman* v. *Updegraff*, 344 U. S. 183, that arbitrary or discriminatory exclusion from public service is a violation of due process. The question there was the validity of an Oklahoma statute which required state officers and employees to take an oath that "I am not affiliated directly or indirectly * * * with any foreign political agency, party, organization or Government, or with any agency, party, organization, or group whatever which has been officially determined by the United States Attorney General or other authorized agency of the United States to be a communist front or subversive organization; * * *" (344 U. S. at 186). As construed by the Oklahoma Supreme Court, "the fact of association alone determines disloyalty and disqualification; it matters not whether association existed innocently or knowingly" (*id.* at 191). This Court held that the

oath offends due process, stating that "[i]ndiscriminate classification of innocent with knowing activity must fall as an assertion of arbitrary power" (*ibid*). In so holding, the Court once again repeated its prior statements that "Congress could not 'enact a regulation providing that no Republican, Jew or Negro shall be appointed to federal office, or that no federal employee shall attend Mass or take any active part in missionary work'" (*id.* at 191–192).

Like the *Lovett* case, therefore, *Wieman* v. *Updegraff, supra,* involved an extraordinary legislative enactment which barred a class of individuals from public service on grounds having no reasonable relationship to the efficiency of the public service. Nothing in the decision suggests that the legislature or the Executive lacks power to prescribe qualifications for public employment which bear a reasonable relationship to such employment, to adopt regulations for the conduct of employees, and to require dismissal of those who the Executive determines have failed to satisfy such qualifications or abide by such regulations. To the contrary, the decision expressly reaffirms the Court's prior ruling in *United Public Workers* v. *Mitchell,* 330 U. S. 75, that the Government could properly "bar its employees from certain types of political activity thought inimical to the interests of the Civil Service" (344 U. S. at 191).

In particular, it is implicit in the Court's opinion in *Wieman* v. *Updegraff, supra,* that loyalty

to the Government of the United States is a reasonable qualification for public employment. The Court cited with approval its earlier decisions in *Garner* v. *Board of Public Works, supra; Adler* v. *Board of Education,* 342 U. S. 485; and *Gerende* v. *Board of Supervisors,* 341 U. S. 56, which upheld rules of exclusion from public office based on loyalty considerations. See Part IC 2, *infra.* It distinguished those cases from the one before it on the sole ground that the Oklahoma statute contained no *scienter* requirement (*id.* at 188–191).

The vice found in the Oklahoma statute, however, is not present here. Looking to the terms of the Executive Order, it is obvious that it does not contemplate "[i]ndiscriminate classification of innocent with knowing activity" (344 U. S. at 191). As originally promulgated, the controlling standard of the Order was that "on all the evidence, reasonable grounds exist for belief that the person involved is disloyal to the Government of the United States" (Part V, Sec. 1). And as amended by Executive Order 10241, the standard still contemplated a factual discrimination between loyalty and disloyalty—*i. e.*, whether "on all the evidence, there is a reasonable doubt as to the loyalty of the person involved to the Government of the United States."

The Order further provided (Part V) that in making this determination, the following activi-

ties of the employee were to be considered—all of which plainly involve *scienter:*

> *a.* Sabotage, espionage, or attempts or preparations therefor, or knowingly associating with spies or saboteurs;
>
> *b.* Treason or sedition or advocacy thereof;
>
> *c.* Advocacy of revolution or force or violence to alter the constitutional form of Government of the United States;
>
> *d.* Intentional, unauthorized disclosure to any person, under circumstances which may indicate disloyalty to the United States, of documents or information of a confidential or non-public character obtained by the person making the disclosure as a result of his employment by the Government of the United States;
>
> *e.* Performing or attempting to perform his duties, or otherwise acting, so as to serve the interests of another government in preference to the interests of the United States;

In addition, also to be taken into consideration was (Part V):

> f. Membership in, affiliation with or sympathetic association with any foreign or domestic organization, association, movement, group or combination of persons, designated by the Attorney General as totalitarian, fascist, communist, or subversive, or as having adopted a policy of advocating or approving the commission of

> acts of force or violence to deny other persons their rights under the Constitution of the United States, or as seeking to alter the form of government of the United States by unconstitutional means.

While this provision does not explicitly use the word "knowingly", here, as in *Garner* v. *Board of Public Works, supra,* and *Gerende* v. *Board of Supervisors, supra, scienter* is implicit. On November 14, 1947, shortly before the Attorney General disseminated his list of designated organizations, the President publicly announced that "Membership in an organization is simply one piece of evidence which may or may not be helpful in arriving at a conclusion as to the action which is to be taken in a particular case." See New York Times, November 15, 1947, p. 2, col. 2–3. Again, the Attorney General emphasized, in issuing his list of organizations, that "as the President has pointed out, * * * it is entirely possible that many persons belonging to such organizations may be loyal to the United States; that membership in, affiliation with or sympathetic association with, any organization designated, is simply one piece of evidence which may or may not be helpful in arriving at a conclusion as to the action which is to be taken in a particular case. 'Guilt by association' has never been one of the principles of our American jurisprudence. We must be satisfied that reasonable grounds exist for concluding that an individual

is disloyal. That must be the guide." See Appendix to Brief for Respondents in *Bailey* v. *Richardson, supra,* pp. 137–138. Further elaborating upon this interpretation of Part V, Section 2f, of the Order, the Chairman of the Loyalty Review Board directed that consideration be given to "the character of the organization, the period, nature and duration of the association, whether the employe * * * was aware of the subversive character of the organization at the time of such association, and the nature of his activities in connection with such organization." See New York Times, December 28, 1947, p. 28, col. 2–6; see also U. S. Civil Service Commission, Memorandum No. 1, March 9, 1948. Finally, the record herein reveals that this interpretation of the Order was followed in the present case. At the hearing before the Loyalty Review Board panel, the panel inquired into petitioner's motives for signing the various petitions and statements which were the subject of the charges and into the circumstances surrounding his membership in certain organizations. (R. 7, 20–21.)

In this light, it is apparent that the problem involved in *Wieman* v. *Updegraff, supra,* is not present here. Rather the Order here is comparable to the statutes which were upheld by this Court in the *Garner, Gerende,* and *Adler* cases, *supra,* as fixing reasonable qualifications for public office.

And even where it is conceded that executive discretion was erroneously exercised, this Court has held that the executive action could not be judicially revised. *Eberlein* v. *United States,* 257 U. S. 82; cf. *Ginn* v. *United States,* 110 C. Cls. 637; *Kellom* v. *United States,* 55 C. Cls. 174. In the *Eberlein* case, plaintiff was removed from office, in accordance with the procedure then in force, on the ground that he had accepted bribes and defrauded the Government. Two years later the Attorney General reinvestigated plaintiff's record and reported that in his judgment the charges were not sustained. Pursuant to a still further investigation, the President, by Executive Order, restored plaintiff to eligibility for appointment, and plaintiff was subsequently reinstated. Affirming the judgment of the Court of Claims denying recovery of the salary of the office from the date of his removal to the date of his reinstatement, this Court declared (257 U. S. at 84):

> But the things required by law and regulations, were done, and the discretion of the authorized officers was exercised as required by law. It is settled that in such cases the action of executive officers is not subject to revision in the courts.

So here, if "the things required by law and regulations were done," respondents' actions are not, under the rule established by the above cases, subject to judicial review. In Part II of this brief, we shall show that petitioner's removal

complied with the pertinent procedural requirements, *i. e.*, the requirements of Executive Order 9835, as amended. In the portions of the brief which follow immediately, we shall demonstrate the application of these underlying principles to the particular constitutional questions raised by petitioner.

B. THE PROCEDURAL REQUIREMENTS OF THE FIFTH AMENDMENT ARE INAPPLICABLE TO THE REMOVAL OF GOVERNMENT EMPLOYEES

1. As in *Galvan* v. *Press, supra,* petitioner's contentions here with respect to the applicability of the Fifth Amendment must be assessed in the light of history. If, as petitioner contends, dismissal from federal service is governed by the procedural requirements of that Amendment, the Constitution has been misinterpreted by the three branches of our Government since the founding of the Republic. Never in our history has a Government employee been granted a judicial trial or a quasi-judicial administrative hearing upon his dismissal from office.

Prior to the innovation of a classified Civil Service, practically all officers and employees were appointed and removed, advanced and demoted on the basis of their political opinions and affiliations. The power to dispense public offices was deemed a perquisite of success at the polls. See United States Civil Service Commission, *History of the Federal Civil Service* (1941); Sageser,

The First Two Decades of the Pendleton Act: A Study of Civil Service Reform (1935); Foulke, *Fighting the Spoilsmen* (1919); Fish, *The Civil Service and The Patronage* (1905). The abuses inherent in the periodic wholesale summary dismissal of incumbent employees for political reasons led to the enactment of the Civil Service Act of 1883. Act of January 16, 1883, 22 Stat. 403, 5 U. S. C. 632 *et seq.* But the only limitation placed upon the power to remove summarily was the prohibition of removal for failure to contribute to any political fund or to render any political service. 5 U. S. C. 633. To further the policy of that Act, however, President McKinley issued an Executive Order in 1897 prohibiting summary dismissals from positions subject to competitive examinations. Under the authority vested in him by R. S. 1753, he ordered that no removal should be made "except for just cause and upon written charges filed with the head of the Department, or other appointing officer, and of which the accused shall have full notice, and an opportunity to make defense." Executive Order 101, July 27, 1897, Eighteenth Annual Report of the United States Civil Service Commission (1902) p. 282. Despite the Presidential Order, removals for political reasons appear to have continued. Since the Order was not issued to implement any statute restricting the executive

power of removal, it was held not to be judicially enforceable.[14]

Accordingly, in 1912, proponents of the merit system obtained the passage of the Lloyd-LaFollette Act which enacted into positive law the provisions of the earlier Order. Employees were given the right to be notified of the charges and to "be allowed a reasonable time for personally answering the same in writing; and affidavits in support thereof; * * *." But although sponsored and enacted by advocates of a classified Civil Service, the Act expressly denied the right to a hearing. It provided that "no examination of witnesses nor any trial or hearing shall be required except in the discretion of the officer making the removal; * * *." 37 Stat. 555. Further Congressional recognition that the removal of public personnel is a discretionary executive function was again evidenced in the Administrative Procedure Act of 1946, which specifically excluded from its coverage "the selection or tenure of an officer or employee of the United States other than examiners." Act of June 11, 1946, 60 Stat. 237, 5 U. S. C. 1004. See Sen. Doc. No. 248, 79th Cong., 2d Sess., pp. 202, 230, 260–261. More recently, in the 1948 revision of the Lloyd-LaFol-

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[14] See *Page* v. *Moffett*, 85 Fed. 38 (C. C. D. N. J.); *Morgan* v. *Nunn*, 84 Fed. 551 (C. C. M. D. Tenn.); *Flemming* v. *Stahl*, 83 Fed. 940 (C. C. W. D. Ark.); *Carr* v. *Gordon*, 82 Fed. 373 (C. C. N. D. Ill.); *Taylor* v. *Kercheval*, 82 Fed. 497 (C. C. D. Ind.).

lette Act. Congress again provided that "no examination of witnesses nor any trial or hearing shall be required except in the discretion of the officer or employee directing the removal * * *." Act of June 10, 1948, 62 Stat. 354, 5 U. S. C. 652.

This record of one hundred-and-sixty years of Government administration speaks with great force. It is a history the writing of which was shared by the judiciary. As we have already shown in Part IA, *supra*, pp. 31–41, the courts have always considered the selection and removal of Government employees to be an executive and legislative function. Repeatedly, the courts declined to interfere with the exercise of executive discretion in this field for the reason that, in the absence of constitutional or statutory provision fixing the tenure of office, all inferior officers and employees hold office at the pleasure of the appointing authority. They refused to intervene even when dismissal was grounded on charges involving serious criminal misconduct such as the acceptance of bribes (*Eberlein* v. *United States, supra*), violation of the Prohibition laws (*Croghan* v. *United States, supra,* and *Dupre* v. *United States, supra*), theft of Government documents (*Kent* v. *United States, supra*), and repeated attempts at seduction by force (*Golding* v. *United States, supra*).

In this light, it cannot be seriously contended that the procedural requirements of the Fifth

Amendment are generally applicable to federal employ, and petitioner so concedes (Pet. Br. 10, 14). The unbroken course of our national history is to the contrary. To disregard that history is to hold that all the decisions to which we have adverted were erroneously decided, that the Lloyd-LaFollette Act, which is regarded as a landmark in civil service reform and which has been in uncontested effect since 1912, is invalid, and that the Administrative Procedure Act, which "created safeguards even narrower than the constitutional ones, against arbitrary official encroachment on private rights" (*United States* v. *Morton Salt Co.*, 338 U. S. 632, 644) is constitutionally defective.

2. Petitioner argues, however, that this case is different in that he has been "branded" as disloyal and barred from Government employment for a period of three years. Such action, it is said, constitutes punishment of a severe type which cannot be imposed without compliance with the Fifth Amendment for the reason that, absent such compliance, disqualification from Government service constitutes a Bill of Attainder (Pet. Br. 18).

The keystone of petitioner's position, therefore, is this Court's decision in *United States* v. *Lovett*, 328 U. S. 303; see also *Cummings* v. *Missouri*, 4 Wall. 277; *Ex parte Garland*, 4 Wall. 333. In the *Lovett* case, the question for decision was the con-

stitutionality of Section 304 of the Urgent Deficiency Appropriation Act of 1943, 57 Stat. 431, 450, which provided that after November 15, 1943, no salary or compensation should be paid Goodwin B. Watson, William E. Dodd, Jr., and Robert Morss Lovett (except for services as jurors or members of the armed forces) out of any monies then or thereafter appropriated unless they were prior to November 15, 1943, again appointed by the President with the advice and consent of the Senate. Construing the Act as imposing a "permanent proscription from any opportunity to serve" (328 U. S., at 316), this Court held it invalid as a Bill of Attainder.

The *Lovett* case thus involved a highly extraordinary legislative enactment, which named three particular individuals and imposed on them a permanent disability which could be removed only by Congress. The decision invalidating such a statute cannot be construed as overruling *sub silentio* the multitude of cases sustaining the executive power to dismiss employees without a hearing for inefficiency, misconduct, violation of law or regulations, or, indeed, for no assigned cause whatever. Nor can it be construed as depriving either Congress or the Executive of the power to prescribe qualifications for federal employment, to adopt regulations for the conduct of federal employees, and to require dismissal of those whom the Executive determines have failed

to satisfy such qualifications or abide by such regulations. Indeed, at the very next term this Court, in *United Public Workers* v. *Mitchell*, 330 U. S. 75, sustained provisions of the Hatch Act which required that federal employees abstain from certain political activities, and imposed "a penalty of dismissal from employment" (330 U. S. at 79) for violation. In so doing it made no suggestion that determination of the fact of violation was not a purely administrative matter to be made according to any procedure which the Executive deemed appropriate, or that such a determination was entitled to any form of judicial review.[15]

The limited scope of the *Lovett*, *Cummings* and *Garland* cases was made plain by this Court in *American Communications Assn.* v. *Douds*, 339 U. S. 382, at pp. 413–4:

> Those cases and this also, according to the argument, involve the proscription of certain occupations to a group classified according to belief and loyalty. But there is a decisive distinction: in the previous decisions the individuals involved were in

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[15] The applicable rules of the Civil Service Commission provided merely for determination of the fact of violation by the Commission "after due notice and opportunity for explanation" Civil Service Rule 15 (set out in the Appendix to the Government's brief in Mitchell). This Court pointed out that "The act provides no administrative or statutory review for the order of the Civil Service Commission" (330 U. S. at 93). See also *Blackmar* v. *Guerre*, 342 U. S. 512, 515.

formants wherever possible.[17] Nevertheless, the necessity that certain types of information be kept confidential is inherent in the nature of the program and of the threats to our national

[17] U. S. Civil Service Commission Memorandum No. 41, April 20, 1949, revised April 17, 1950, instructed all Boards that "all reasonable efforts should be made to induce all identified non-confidential witnesses who have given pertinent information adverse to the employee, to attend the hearing, testify in the employee's presence and subject themselves to cross-examination." The Boards were advised that, "if any such witness declines or fails to appear as a witness after thus being invited by the Board, the Board shall take into consideration any reason or excuse existing for failure or refusal of such witness so to testify, in considering and evaluating the testimony of such witness as it appears in the FBI report, or elsewhere." See also Memorandum No. 41, Second Revision, February 28, 1951; Memorandum No. 41, Third Revision, February 19, 1952; Memorandum No. 41, Third Revision, Supplement No. 1, April 15, 1953, which provided instructions for inviting informants, who were not willing to testify in the presence of the employee and his counsel, to give their testimony to the Boards without the presence of the employee and his counsel.

Mention should also be made of the solution sought by the Loyalty Review Board of the problem of substantiating charges that an employee has improperly associated with certain individuals asserted to be Communists and charges against an employee of being a member of a Communist organization, which depend upon the unamplified report of an informant. In U. S. Civil Service Memorandum No. 30, Second Revision, January 23, 1950, the Loyalty Review Board stated its opinion that "a charge of association with alleged Communists should not be made unless the applicable Board has been first furnished with sufficient factual information, both with respect to the claimed association, and the allegation that the persons with whom the employee is charged with association, are, in fact, Communists, so that

security which it was intended to combat.[18] We recognize, of course, that the necessity for non-disclosure of confidential information in the interests of national security may also arise in a criminal prosecution, such as treason or espionage, and that the Government must choose between disclosure and non-prosecution, that it cannot use the evidence of any informant in a criminal case unless his testimony is presented in open court. We submit, however, that, weighing the

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the Board may intelligently reach a fair conclusion thereon as to the ultimate fact asserted in the record. It is the understanding of the Loyalty Review Board that the FBI report will name such alleged Communists and set forth in the report such identifying facts as, in the opinion of the FBI, security reasons will permit, and in the absence of such facts will authenticate the status of such alleged Communist associates by suitable FBI evaluation of the confidential source of the information, and that with respect to the facts involved in the status of the employee being investigated, the FBI will, in its report, furnish to the Loyalty Boards such relevant surrounding data as the FBI shall conclude its security reasons permit, and will include in such report such evaluation of the factual source as to the FBI shall seem proper." See also Memorandum No. 10, Revised, January 23, 1950.

[18] The measures taken by the British Government with respect to disloyalty in the public service have been described as follows (Bontecou, *The Federal Loyalty-Security Program* (1953), c. VIII, pp. 265–267):

"The actual interview with the civil servant has none of the procedural formalities or safeguards of an administrative hearing. It usually lasts from one-half to three hours, although the accused may be called back later. *No effort is made to inform him of the evidence in the record; on the contrary, great stress is laid upon the concealment of that*

conflicting interests involved, the Government should not be put to such a choice in the field of personnel administration. Cf. *United States* v. *Reynolds*, 345 U. S. 1; *United States* v. *Nugent*, 346 U. S. 1.

Similar considerations apply with respect to judicial review of the executive determination of loss of confidence in the loyalty of an employee.

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evidence lest knowledge of it may lead to disclosure of sources of information. The questions put by the advisors may relate to matters concerning which they are already fully informed, or may range over areas not covered by the records before them. Inevitably such an interview must take on, to some extent, the character of a battle of wits. Regardless of these difficulties, the advisors must make not only the relatively simple conclusion of fact as to present membership in the Communist Party or some other subversive organization, but the far more difficult and subjective judgment as to the present trustworthiness of the man whose direct connections with the Party are in the past. This judgment, when made after full discussion of the case by all the advisors, is incorporated in a report to the minister which may analyze the evidence and set forth fully the reasons for the conclusion.

* * * * *

"*In the framing of allegations, more attention has been given to the requirement that the source of information be concealed than to the Prime Minister's statement that the civil servant 'should be given chapter and verse' in support of the charge against him.* In seventeen out of twenty-six cases, the accused was told nothing more than that he was either believed to be a member of the Communist Party, or that he was associated with it or the Fascist Party in such a way as to raise legitimate doubts as to his reliability. In five cases he was given, in addition, the name of the branch to which he was alleged to have belonged. In one of these five, continued activity on behalf of the Party was also

Thus, it is not in the best interests of an efficient Civil Service that an employee be dismissed on charges of bribery or theft if, in fact, he is not guilty. As we have pointed out, it has been held inappropriate for courts to review such matters of internal administration, notwithstanding that courts are accustomed to make comparable determinations in dealing with criminal cases. Loyalty in the government service presents an *a fortiori* situation. Determinations as to whether

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alleged, and in another it is reported that the questioning by the Advisory Body revealed that an allegation had been made that the individual was the secretary of his branch. In the remaining three, additional allegations were made as follows:

1. You have taken part in the activities of the Party since the end of the war.

2. Before the 1939–45 War [you] regularly attended and spoke at Communist meetings.

3. You took an active part between 1941 and 1943 in the activities of the Party in various places in * * * You became educational organizer for the Party in * * * District. You also used an alias for your Party work.

Protests against these practices have been to very little avail.

* * * * *

"It is evident that in this procedure none of the traditional safeguards, which we sum up in the phrase 'due process,' are present. *The Government has taken the position that where evidence and sources of information cannot be made known, the protection afforded by a voluntary adoption of forms of judicial procedure would prove illusory.* Neither is the civil servant protected by any statutory provisions. Control of the Civil Service in England is a function of the 'prerogative,' and matters of prerogative are not the subject of legislation. Moreover, they are beyond the jurisdiction of the courts." [Emphasis added.]

loyalty is certain, at times based on confidential information, are remote from the normal judicial sphere. As this Court said of an analogous problem in *Chicago & S. Air Lines* v. *Waterman Corp.*, 333 U. S. 103, 111:

> The President, both as Commander-in-Chief and as the Nation's organ for foreign affairs has available intelligence services whose reports are not and ought not to be published to the world. It would be intolerable that courts, without the relevant information, should review and perhaps nullify actions of the Executive taken on information properly held secret. Nor can courts sit *in camera* in order to be taken into executive confidences. * * *

Moreover, it must be recognized that it is in the public interest that only those whose loyalty is beyond suspicion be employed by the Government. In the present state of the world, it cannot be said that executive alarm "about a coalition of Communist power without and Communist conspiracy within the United States is either a fantasy or a pretense. * * * Certainly no responsible American would say that there were then or are now no possible grounds on which [the Executive] might believe that Communists in our midst are inimical to our security." *Harisiades* v. *Shaughnessy*, 342 U. S. at 590. Since "disloyalty is screened by ideological patterns and techniques of disguise that make it difficult to identify" (*Wieman* v. *Updegraff*,

supra, at 188), dismissal from Government service could properly be based not on proven fact but on suspicion.[19] But, as the Lord Chancellor of England has said in a similar context, "it seems obvious that no tribunal for investigating the question whether circumstances of suspicion exist warranting some restraint can be imagined less appropriate than a Court of law. No crime is charged. The question is whether there is ground for suspicion that a particular person may be disposed to help the enemy." *Rex* v. *Halliday* (*Ex parte Zadig*), [1917] A. C. 260, 269; cf. *Rex* v. *Home Secretary* (*Ex parte Lees*), [1941] 1 K. B. 72; *Greene* v. *Home Secretary*, [1942] A. C. 284; *Liversidge* v. *Anderson*, [1942] A. C. 206; *Rex* v. *Home Secretary* (*Ex parte Budd*), [1942] 2 K. B. 14. "The very nature of the President's power to order the removal of [Government employees] rejects the notion that courts may pass judgment upon the exercise of his discretion." *Ludecke* v. *Watkins*, 335 U. S. 160, 164; cf. *United States* v. *Reynolds*, 345 U. S. 1.

We conclude, therefore, as did the court below in the *Bailey* case, *supra*, that "Upon the contention that suspicion of disloyalty has characteris-

[19] In fact, far more than suspicion is required: the Executive Orders contemplate careful investigation, opportunity to the employee to testify, and dismissal only if, on all the evidence, "there is a *reasonable* doubt as to the loyalty of the person involved to the Government of the United States." [Emphasis added.]

tics distinguishing it from suspicion of other offenses, * * * the differences tend to solidify rather than to weaken the application of the doctrine that the President and the Congress are responsible for the qualifications, ability, judgment and loyalty of Government employees and that removal from Government employment is within their discretion." (182 F. 2d at 65.)

C. PETITIONER'S DISMISSAL UNDER EXECUTIVE ORDER 9835, AS AMENDED, DID NOT VIOLATE THE FIRST AMENDMENT

Petitioner's complaint also attacks the loyalty program and respondents' actions thereunder with respect to him as an abridgment of the right of freedom of speech and opinion guaranteed by the First Amendment (R. 13). Petitioner, however, does not brief this point. Accordingly, we do not know the contentions underlying this claim of unconstitutionality. In this posture, we shall deal herein with what appears to us to be the principal arguments suggested in the dissenting opinion in the *Bailey* case, *supra*, and other public discussions of the loyalty program.

1. In this area also, petitioner's challenge to the validity of the Executive Order cannot be divorced from the historical setting. Executive and legislative concern with the problem of loyalty in the Federal Government is not new. Thus we are told that President Washington wished appointments to go only to those who were "sound supporters of the new system." Fish, The Civil

4. (a) Petitioner urges, however, that the scope of the decision in *Wieman* v. *Updegraff, supra,* goes beyond the issue of the reasonableness of the qualifications fixed for Government service. Petitioner insists that the Due Process Clause is equally applicable to the procedure followed in determining whether an employee meets the qualifications. We submit that the decision cannot be so construed. Since this contention was not before the Court, the decision cannot be read as overruling *sub silentio* the countless cases sustaining the executive power to dismiss employees without a hearing or as ruling *sub silentio* that the Lloyd-LaFollette and Administrative Procedure Acts are invalid.

Further, insofar as petitioner has been injured by the stigma to his reputation, we see no basis for holding that that stigma is a thing apart, which gives rise to constitutional rights not applicable to other dismissals from the Government service. The difference in harm resulting from a dismissal on loyalty grounds and a dismissal for offenses of serious moral turpitude is a difference in degree, not in kind. It might be equally difficult for one dismissed because of the acceptance of bribes, theft, sex offenses, or even incompetence, to obtain suitable employment elsewhere. Yet, as we have noted *supra,* pp. 31–41, 44, such employees are neither entitled to a quasi-judicial hearing or to judicial review of the merits of their dismissals.

Service and the Patronage (1905) 9.[20] During President Lincoln's administration a policy of dismissing all employees deemed disloyal appears to have been pursued as a matter of course.[21] President Wilson was similarly faced with the problem of disloyalty during World War I. On April 17, 1917, he issued a confidential Executive Order providing that:

> The head of a department or independent office may forthwith remove any em-

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[20] In a letter of September 27, 1795, to the Acting Secretary of State, Washington stated, "I shall not, whilst I have the honor to Administer the government, bring a man into any office, of consequence knowingly whose political tenets are adverse to the measures which the *general* government are pursuing; for this, in my opinion, would be a sort of political Suicide." Washington, *Writings* (Fitzpatrick Ed.) Vol. 34, p. 315.

[21] Detailed evidence of the extent t which such a policy of dismissal was followed is not readily available since it does not appear that the policy was ever formalized in terms of presidential instructions or regulations. The practice is, however, indicated with sufficient clarity by the following:

The Annual Report of the Postmaster General for 1861 (S. Doc. No. 1, 37th Cong., 2d Sess., Vol. 3, p. 582) states: "By the existing laws all postmasters and mail-carriers, and all other persons engaged in handling the mails of the United States, or in clerical service, were required to take the usual oath of allegiance to this government, as well as for the faithful performance of their duties. Whenever it was made apparent by their declarations, or by their conduct, that there was a practical repudiation of the obligation of this oath, whether the party was a postmaster or a postal contractor, I ordered a removal from office in the one case and the deprivation of contract in the other. * * *"

Similar evidence appears in the *Report on the Civil Service of the United States*, H. Rep. No. 17, 49th Cong., 2d Sess.

Granted that the stain of a dismissal on loyalty grounds is a deep one which "has become a badge of infamy" (*Wieman* v. *Updegraff, supra,* at 191), this fact neither invalidates petitioner's dismissal without a quasi-judicial hearing nor gives him a right to redress. If, as we have shown, the power of the Congress and the Executive to provide for the removal of federal employees is unrestricted, the damage suffered by an individual as the result of official action within the scope of that authority is *damnum absque injuria.* Cf. *Spalding* v. *Vilas,* 161 U. S. 483; *Larson* v. *Domestic & Foreign Corp.,* 337 U. S. 682, 687, n. 7; *Harisiades* v. *Shaughnessy,* 342 U. S. 580, 590–591; *Gregoire* v. *Biddle,* 177 F. 2d 579 (C. A. 2), certiorari denied, 339 U. S. 949; *Jones* v. *Kennedy,* 121 F. 2d 40 (C. A. D. C.), certiorari denied, 314 U. S. 665; *Dodez* v. *Weygandt,* 173 F. 2d 965 (C. A. 6); *Gibson* v. *Reynolds,* 172 F. 2d 95 (C. A. 8), certiorari denied, 337 U. S. 925.

Recent decisions of this Court in other fields reinforce this conclusion. Cf. *United States* v. *Nugent,* 346 U. S. 1; *Shaughnessy* v. *Mezei,* 345 U. S. 206; *United States ex rel. Knauff* v. *Shaughnessy,* 338 U. S. 537. Those cases also involved due process attacks upon action taken pursuant to a plenary power of Congress and the Executive. *Mezei* and *Knauff* involved the power to exclude aliens; *Nugent* involved the power of conscription. In those cases, as in the present one, the clash between public and individual in-

terests was colored by the fundamental nature of the individual interests invaded, *i. e.*, separation from family, friends, home and business. The Court nevertheless held that such hardship could validly be inflicted without a hearing. Of particular importance here, the Court further held that, in view of the plenary character of the power in question, executive action could validly be based on confidential information. The plenary power of the Executive and the Congress over the tenure of federal employees is no less firmly imbedded in the "tissues of our body politic" (*Galvan* v. *Press, supra,* at 531).

(b) Petitioner's approach to the problem of due process in loyalty cases consists of a central assertion that "where a system is created of discharge and exclusion from government service on the basis of an adverse finding against the employee on the issue of his loyalty arrived at by a proceeding which has the appearance of a trial on the merits, the finding which is the basis of governmental action may not be arbitrarily made. It must be made by a hearing which is in fact a hearing with full opportunity to 'test, explain and refute.'" (Pet. 15.) The core of his contention appears to be an assumption, not justified, that this Court, in the *Wieman* case, has already found that due process in the area of loyalty dismissals can only be met by the equivalent of an adversary trial on the merits.

If it be assumed, *arguendo*, that the *Wieman* case must be read as holding that dismissals on loyalty grounds are subject to the requirements of procedural due process,[16] it is crucial to remember that due process is a variable concept, to be measured in the light of all surrounding circumstances. Here, the measuring circumstances consist of the balance to be struck between the protection of the individual and the demands of national security.

Analyzing petitioner's basic position precisely, he objects that he was given no opportunity for confrontation and cross-examination of confidential informants. Petitioner argues that, for this reason, the procedure which resulted

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[16] In so assuming, we do not mean to suggest further that *Wieman* v. *Updegraff*, *supra*, can be read as extending the protection of the Due Process Clause to dismissals on other than loyalty grounds as well. It should be noted that petitioner joins us in this limited reading of the case. Petitioner concedes that where loyalty is not involved no constitutional issues are raised (Pet. Br. 10, 14–15, 19–20). But even if *Wieman* v. *Updegraff*, *supra*, could be given this broader interpretation, we think it clear that the Due Process Clause does not require a quasi-judicial hearing in the ordinary employee dismissal case. As we point out above, due process is not a technical conception with a fixed content unrelated to time, place and circumstances. For the reasons stated in Part IA of this brief, *supra*, pp. 31–41 (see also pp. 41–44, *supra*), we submit that weighing the individual's interest against the infinite variety and complexity of the tasks of government administration, due process does not compel modification of the extent of discretion traditionally vested in the Executive branch in this area.

in his discharge was "patently arbitrary or discriminatory" within the meaning of *Wieman* v. *Updegraff*, 344 U. S. at 192 (Pet. Br. 20). Admittedly, the absence of confrontation and cross-examination may, in some circumstances, be "patently" arbitrary. It does not follow, however, that what is "patently" arbitrary in some circumstances is also "patently" arbitrary in other circumstances within the meaning of due process of law.

As Mr. Justice Holmes cogently observed in *Moyer* v. *Peabody*, 212 U. S. 78, 84, "it is familiar that what is due process of law depends on circumstances. It varies with the subject-matter and the necessities of the situation." Cf. *Wolf* v. *Colorado*, 338 U. S. 25, 27; *Federal Communications Comm'n* v. *WJR*, 337 U. S. 265, 275. To quote a recent summary of the Court's decisions in this area (*Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U. S. 123, 163, *Frankfurter*, J., concurring):

> Due process is not a mechanical instrument. It is not a yardstick. It is a process. It is a delicate process of adjustment inescapably involving the exercise of judgment by those whom the Constitution entrusted with the unfolding of the process.
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> * * * * *
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> The precise nature of the interest that has been adversely affected, the manner in which this was done, the reasons for doing

> it, the available alternatives to the procedure that was followed, the protection implicit in the office of the functionary whose conduct is challenged, the balance of hurt complained of and good accomplished—these are some of the considerations that must enter into the judicial judgment.

Applying these considerations to the immediate situation, it seems to us that insofar as dismissal for disloyalty has peculiarities which distinguish it from dismissal for bribery, theft and other offenses, they are adverse to petitioner's conclusion. In essence, the problem is one of "balancing the conflicting individual and national interests involved." *American Communications Ass'n* v. *Douds,* 339 U. S. 382, 410.

From the point of view of the security of the nation, the retention in the Government service of one suspected of theft or a similar offense would not be of great importance, and the revelation of the method of detection and the names of witnesses would probably not affect the public interest. But disloyalty in the Government service under present circumstances is a matter of great public concern. And it was the informed judgment of the President and those charged by him with administering the loyalty program that in many instances disclosure of the identity of informants, of investigative techniques, and of sources of information, would be strongly against the public interest.

As explained by the former chairman of the Loyalty Review Board (Richardson, *The Federal Employee Loyalty Program,* 51 Col. L. Rev. 546, 549–550):

> * * * the role of the FBI report must be appreciated. In the overwhelming majority of cases, the record, without the FBI report, would not contain important material information with respect to derogatory items concerning the particular employee. The long and varied experience of the FBI is to the effect that its investigative reports should include statements from confidential sources. Of necessity, these sources are of varied natures. The FBI has many agents operating secretly for the purpose of ferreting out facts to aid the President. The disclosure of their identity, of circumstances indicative of identity, would not only completely destroy their usefulness but in many cases subject *them to serious physical danger.* Other confidential informants are members of the public who will give information to the FBI only under a strict seal of confidence, their reasons being the obvious ones of the ordinary citizen who refuses to get involved in a public controversy. A further source might be fellow employees or business associates who, unless given complete anonymity, would not under any circumstances disclose their knowledge to the

FBI. Numerous comparable informants might be referred to, and in the overwhelming majority of cases, the material facts with reference to derogatory items come from such confidential sources.

As a result, the FBI rigorously observes its promises of confidence and will not disclose to anyone these evidential sources. Unless the Board in question is permitted to take cognizance of such material on these terms, it will be unable to consider such material at all. But the full scope of the FBI report must be available to the Board, or the whole system becomes insufficient. It is not an answer to suggest that the confidential reports made by the FBI should be used only as a lead to actual first-hand evidence. The very nature of such confidential information implies that, since the persons would speak to the FBI only in confidence, personal testimony could not be secured even if the Board had the power to require it.

See also Hoover, *A Comment On the Article "Loyalty Among Government Employees,"* 58 Yale L. J. 401, 409-410; New York Times, Dec. 28, 1947, p. 28, col. 2-6 (Statement of Seth Richardson). Recognizing the burden placed upon the employee by the non-disclosure of confidential information, the Loyalty Review Board endeavored to secure the testimony, and permit confrontation and cross-examination, of in-

> ployee when he has ground for believing that the retention of such employee would be inimical to the public welfare by reason of his conduct, sympathies or utterances, or because of other reasons growing out of the war. Such removal may be made without other formality than that the reasons shall be made a matter of confidential record, subject, however, to inspection by the Civil Service Commission.[22]

Again, during World War II, procedures were

(1868). The Jenckes Committee had sent interrogatories to numerous public officers which included questions with respect to political considerations affecting appointments and removals from office. Only two of the answers relating to these questions are set out in the Report. The Commissioner of Customs stated, "I never inquired about the politics of anyone, except during the war, and then only to satisfy myself that he was loyal" (p. 20). The Superintendent of the Assay Office, New York City, stated that in making appointments "Good character, capacity, and, in the light of recent events, *loyalty*, are *sine quo non*" and further stated that "during the war two of our workmen were removed for carrying their partisanship to the point of practical disloyalty" (p. 23).

That like policies were followed by others in President Lincoln's administration is indicated by the statement that Secretary of War Stanton, on the day of his confirmation, "consulted with the 'committee on loyalty of Federal Employees' in order to learn who in his Department * * * could be trusted and who must be arrested or dismissed." F. A. Flower, *Edwin McMasters Stanton* (1905), p. 119. The Committee referred to was evidently a select committee of the House of Representatives appointed pursuant to resolution of Mr. Potter, adopted July 9, 1861, 56 Cong. Globe 26.

[22] The entire text of the Order and of certain accompanying correspondence is set out in Corwin, *The President* (1948), pp. 433–4, n. 100.

adopted for the screening of disloyal applicants for employment and the dismissal of employees deemed disloyal. In 1939 Congress enacted in Section 9A of the Hatch Act a prohibition of the employment by the Government of any person who is a member of "any political party or organization which advocates the overthrow of our constitutional form of government." 53 Stat. 1148, 5 U. S. C. 118j. In June 1940, Congress further provided in a rider to the Emergency Relief Appropriation Act of 1941, that "no alien, no Communist, and no member of any Nazi Bund Organization shall be given employment or continued in employment on any work project prosecuted under the appropriations contained in this joint resolution." Section 15 (f) of the Act of June 26, 1940, 54 Stat. 611, 620.[23] And in 1941, Congress initiated the practice of embodying riders in appropriation acts barring the use of any of the funds appropriated for the payment of compensation to "any person who advocates, or who is a member of an organization that advocates, the overthrow of the Government by force or violence." 55 Stat. 42, 55, 75, 123, 131, 176, 197, 235, 303, 351, 394, 403, 446, 465, 497, 540, 576, 755, 837.[24] Meanwhile, in June and July 1940, the Lloyd-LaFollette Act (37 Stat. 555, 5 U. S. C.

[23] See also Act of July 1, 1941, 55 Stat. 396, 402, Act of July 2, 1942, 56 Stat. 634, 640.

[24] More recent evidence of this practice is found in 67 Stat. 17, 60, 72, 194, 201, 224, 259, 277, 293, 316, 335, 353, 385, 436, 481.

652) was amended to give the War and Navy Departments and the Coast Guard the authority to remove summarily any employee in the interests of national security. Acts of June 28, 1940 and July 2, 1940, 54 Stat. 679, 713, 50 U. S. C. App. (1946 Ed.) 1156.

To carry out these mandates of Congress, the Civil Service Commission on June 20, 1940, issued Department Circular No. 222, in which it stated that the Commission "will not certify to any department or agency, the name of any person when it has been established that he is a member of the Communist party, the German Bund, or any other Communist, Nazi, or Fascist organization." On March 16, 1942, the Civil Service Commission pursuant to the authority delegated to it by Executive Orders 9063 (7 F. R. 1075) and 9067 (7 F. R. 1407), adopted War Service Regulation II Section 3 (7 F. R. 7723), which provided that an applicant may be denied appointment if there is "a reasonable doubt as to his loyalty to the Government of the United States." [25]

As to incumbent employees, the Civil Service Commission's Circular of June 20, 1940, after referring to the statutory provisions mentioned above, stated "In view of the exigencies of the times, the Commission believes that Government

[25] The validity of this Regulation was unsuccessfully challenged in *Friedman* v. *Schwellenbach*, 159 F. 2d 22 (C. A. D. C.), certiorari denied, 330 U. S. 838, rehearing denied 331 U. S. 865.

agencies may freely take these matters into consideration in determining whether the removal of a particular employee will 'promote the efficiency of the service' ". Thereafter the Office of the President issued a directive calling for F. B. I. investigations of the loyalty of incumbent employees on request from the interested Government agency.[26] In June 1941, Congress appropriated $100,000 for an investigation of Government employees "who are members of subversive organizations or advocate the overthrow of the Federal Government" and directed the F. B. I. to report its findings to Congress. Act of June 28, 1941, 55 Stat. 265, 292.[27] The report made to Congress pursuant to this direction[28] clearly sets forth the practices thereupon adopted in connection with loyalty investigations of incumbent employees.

The F. B. I. was authorized to institute such investigations on its own initiative and to transmit the report of the investigation to the interested agency for its determination as to what action was appropriate.[29] Inasmuch as the congressional mandate provided for the investigation of members of "subversive" organizations, it was

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[26] Set out in H. Doc. No. 833, 77th Cong., 2d Sess., pp. 6–7.

[27] See also Act of July 2, 1942, 56 Stat. 468, 482, appropriating $200,000.

[28] H. Doc. No. 833, 77th Cong., 2d Sess.

[29] *Ibid.*, pp. 9–10.

necessary to determine which organizations should be so considered. In June 1941, the Attorney General advised the F. B. I. that the Communist Party was an organization within the congressional intent and that other organizations having Communist backgrounds or affiliations were intended to be included. The F. B. I. was requested to furnish information as to such organizations. Thereafter the German-American Bund, and seven other groups, were also designated as coming within the congressional mandate.[30] In April 1942, the Attorney General established an Interdepartmental Committee to advise the various employing agencies in the use of F. B. I. reports.[31] This Committee designated some thirty-two additional organizations which were to be considered in the investigation of charges against employees. The last-mentioned organizations were neither rated as "subversive" or "non-subversive" under the law. While membership or participation in their activities did not require dismissal under the law, it was concluded that such affiliations were clearly relevant to a broad inquiry as to fitness for public employment.[32]

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[30] *Ibid.*, p. 19.

[31] The Committee comprised officials representing the Interior Department, Treasury Department, Commerce Department, Justice Department, and the Federal Deposit Insurance Corporation. *Ibid.*, p. 24.

[32] *Ibid.*, pp. 2, 12, 19–20, 27.

On February 5, 1943, President Roosevelt issued Executive Order 9300 (8 F. R. 1701) replacing the Attorney General's Interdepartmental Committee with a new "Interdepartmental Committee" on employee investigations.[33] Pursuant to this Order the names of some 47 organizations characterized as subversive were disseminated among government agencies for use in connection with consideration of employee loyalty. 5 CFR 210.15, Appendix A., pp. 200–201. This Order remained in effect until it was revoked and superseded by Executive Order 9835.

Thus, it is apparent that measures to insure the loyalty of federal employees have been adopted in every major crisis which this nation has had to face. So far as appears, those measures were applied without distinction based on the responsibility of the position held or "sensitiveness" of the agencies affected. They were, moreover, often applied without regularized procedure, without opportunity for even a limited hearing, and with little or no attempt to prescribe standards for determination of disloyalty. Accordingly, the thrust of petitioner's argument is that a kind of action which has been taken by the

[33] This Committee comprised officials representing the Treasury Department, Interior Department, Federal Reserve Board, Federal Deposit Insurance Corporation, and the Civil Service Commission. Report of the President's Temporary Commission on Employee Loyalty (1947), p. 6, n. 5.

executive in every major crisis presenting problems of loyalty was in each case unconstitutional.

Petitioner's argument goes further than that, however, for in asserting that political opinions, associations and activities may not constitutionally be considered as a basis for appointment or removal from office, he is in effect asserting that the practice followed by almost every President from Jefferson to Cleveland was unconstitutional. It is notorious that during that era in our history, political affiliations were regarded as almost the primary consideration in making appointments, and removals for political grounds were commonplace. See generally, Fish, *The Civil Service and the Patronage* (1905); United States Civil Service Commission, *History of the Federal Civil Service, 1789 to the Present* (1941). The prevailing practice was that "to the victor belong the spoils," a practice which was authoritatively described as meaning that "the entire force of the civil service of the United States may be changed for mere political opinion." H. Rep. No. 47, 40th Cong., 2d Sess., p. 5.[34] While this "indiscriminate removal of public officers for a mere difference of political opinion" (Democratic Party Platform of 1832, quoted in Civil Service Commission, *History of the Federal Civil Service, supra,* p. 21) was often roundly condemned, it was never thought to present any constitutional question

[34] For a contemporary description see T. H. Benton, *Thirty Years' View* (1865), pp. 159–163.

or other occasion for judicial relief. On the contrary, it is in the context of this prevailing practice that the cases cited in Point IA of this brief were decided.[35] In the light of this history and these authorities, the First Amendment cannot be regarded as placing any limitation on the executive power of removal from Government office.

2. Assuming, however, that exclusion from federal service pursuant to a statute or regulation of general applicability gives rise to issues different from those raised by exclusion pursuant to a less formalized exercise of executive discretion, we think it clear, under principles recently reiterated by this court, that Executive Order 9835, as amended, was subject to no constitutional infirmity under the First Amendment. *Adler* v. *Board of Education,* 342 U. S. 485; *Garner* v. *Board of Public Works,* 341 U. S. 716; *Gerende* v. *Board of Supervisors,* 341 U. S. 56; *United Public Workers* v. *Mitchell,* 330 U. S. 75; cf. *American Communications Assn.* v. *Douds,* 339 U. S. 382.

In *Public Workers,* the Court upheld a legislative prohibition of political activity by federal employees. In so doing, it recognized that the prohibition interfered "with what otherwise would be the freedom of the civil servant under the First, Ninth and Tenth Amendments" (330

[35] For cases refusing to consider allegations that dismissals were for purely political reasons, see note, 14 *supra.*

U. S. at 95). But it held that since Congress could reasonably conclude that such legislation was necessary to forestall actions of employees which "menace the integrity and the competency of the service" (*Id.* at 103), it lay within Congressional power. The Court stated the guiding principles in these terms (*Id.* at 101, 102):

> * * * For regulation of employees it is not necessary that the act regulated be anything more than an act reasonably deemed by Congress to interfere with the efficiency of the public service. * * *
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> * * * * *
>
> * * * The determination of the extent to which political activities of governmental employees shall be regulated lies primarily with Congress. Courts will interfere only when such regulation passes beyond the generally existing conception of governmental power.

While *Public Workers* did not involve the precise question here presented, it is apparent that the principles there laid down are equally applicable to those political activities of employees which relate to loyalty. Disloyalty to the United States is a far greater menace to the integrity and competence of the service than mere partisan political activity. It is not surprising, therefore, that the principles formulated in *Public Workers* were followed by this Court in *Gardner, Adler,* and *Gerende* in sustaining State leg-

islation aimed at safeguarding the public service from disloyalty.

The question in *Garner* was the validity of an amendment to a city Charter which barred from the city's public service persons who, subsequent to its adoption, advise, advocate, or teach the violent overthrow of the Government or who are or become affiliated with any group doing so. Holding the amendment constitutional, the Court stated (341 U. S. at 720–721):

> * * * The provisions operating thus prospectively were a reasonable regulation to protect the municipal service by establishing an employment qualification of loyalty to the State and the United States. Cf. *Gerende* v. *Board of Supervisors of Elections*, 341 U. S. 56 (1951). Likewise, as a regulation of political activity of municipal employees, the amendment was reasonably designed to protect the integrity and competency of the service. This Court has held that Congress may reasonably restrict the political activity of federal civil service employees for such a purpose, *United Public Workers* v. *Mitchell*, 330 U. S. 75, 102–103 (1947), and a State is not without power to do as much.

Faced with a similar question in *Adler*, the Court expressed itself in even more forceful language (342 U. S. at 492):

> It is clear that such persons have the right under our law to assemble, speak, think and believe as they will. *Communi-*

> *cations Assn.* v. *Douds*, 339 U. S. 382. It is equally clear that they have no right to work for the State in the school system on their own terms. *United Public Workers* v. *Mitchell*, 330 U. S. 75. They may work for the school system upon the reasonable terms laid down by the proper authorities of New York. If they do not choose to work on such terms, they are at liberty to retain their beliefs and associations and go elsewhere. Has the State thus deprived them of any right to free speech or assembly? We think not.

Of particular importance here, these cases reject the contention that beliefs and associations may not properly be considered in determining eligibility for public employment. As the Court had pointed out in *American Communications Assn.* v. *Douds, supra,* at 391:

> * * * The fact that the statute identifies persons by their political affiliations and beliefs, which are circumstances ordinarily irrelevant to permissible subjects of government action, does not lead to the conclusion that such circumstances are never relevant. * * * If accidents of births and ancestry under some circumstances justify an inference concerning future conduct, it can hardly be doubted that voluntary affiliations and beliefs justify a similar inference when drawn by the legislature on the basis of its investigations.

In a comparable vein, the Court stated in *Garner*, addressing itself to the validity of an affidavit requiring disclosure of past or present membership in the Communist Party, that (341 U. S. at 720):

> * * * a municipal employer is not disabled because it is an agency of the State from inquiring of its employees as to matters that may prove relevant to their fitness and suitability for the public service. Past conduct may well relate to present fitness; past loyalty may have a reasonable relationship to present and future trust. Both are commonly inquired into in determining fitness for both high and low positions in private industry and are not less relevant in public employment. The affidavit requirement is valid.

Similarly, the Court declared in *Adler* that (342 U. S. at 493):

> * * * One's associates, past and present, as well as one's conduct, may properly be considered in determining fitness and loyalty. From time immemorial, one's reputation has been determined in part by the company he keeps. In the employment of officials and teachers of the school system, the state may very properly inquire into the company they keep, and we know of no rule, constitutional or otherwise, that prevents the state, when determining the fitness and loyalty of such persons, from considering the organizations and persons with whom they associate.

These decisions, we submit, control the disposition of the present case. If States and Municipalities may establish an employment qualification of loyalty as a reasonable regulation to protect the public service, certainly, the Federal Government "is not without power to do as much." *Garner* v. *Board of Public Works, supra,* at 721.

Executive Order 9835, as amended, was not a prohibition of advocacy or expression of views. It did not declare illegal any organization, or prohibit any of its activities. It was aimed at conduct—at the danger that certain types of persons, if allowed to remain in the Government service, might betray the trust reposed in them by the commission of acts injurious to the national security. The Order was promulgated because the President concluded, on the basis of extensive investigations and studies by both the Executive and Legislative branches, of the experience of other nations, and of facts peculiarly within his knowledge concerning our international relations that the existence of the world-wide totalitarian movements of Communism and Fascism raised substantial dangers of serious evils to be expected from the presence within the federal service of adherents of those movements.[36] Because of the peculiar opportunities afforded Government em-

[36] The results of some of these studies were set forth at pages 24–55 of Respondents' Brief in *Bailey* v. *Richardson, supra.*

ployees for espionage and other conduct destructive of the most vital interests of the nation, he established the standard that those persons as to whom there is a reasonable doubt of loyalty to the United States be denied federal employment. In so doing, he adopted a regulation which clearly comes within the "generally existing conception of governmental power" (*United Public Workers* v. *Mitchell, supra* at 102), for like measures have been adopted by the Federal Government in every period of comparable crisis and have been adopted by State and Municipal Governments to meet the present crisis. That others may differ with the President as to the necessity or wisdom of such a course is immaterial. The judicial inquiry is limited to the question whether there was a reasonable basis for the executive judgment. And, in the light of this Court's recent opinions setting forth the substantial dangers to the national security posed by the communist conspiracy,[37] there is no room for doubt that the executive judgment was reasonable. The words of this Court in the *Mitchell* case (with one appropriate substitution) are completely apposite here: "To declare that the present supposed evils * * * are beyond the power of [the President] to redress would leave the

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[37] See *e. g., Dennis* v. *United States*, 341 U. S. 494; *Galvan* v. *Press*, 347 U. S. 522; *Carlson* v. *Landon*, 342 U. S. 524; *Harisiades* v. *Shaughnessy*, 342 U. S. 580.

nation impotent to deal with what many sincere men believe is a material threat to the democratic system" (330 U. S. at 99).

3. Petitioner makes much of the fact that his position was non-sensitive, implying that the danger feared was remote and hypothetical (Pet. Br. 3, 11). The identical contention was made with at least equal force in *Public Workers* and was rejected by the Court. Just as in that case, Congress could rationally conclude that political activity of any government employee, however menial, would interfere with the efficiency of the federal service, so here the President could rationally conclude that no activity of the Government was so unimportant that it could be entrusted to persons deemed disloyal to the United States.

Further, the question here is not whether there was a clear and present danger that petitioner's continued employment would result in the subversion of our form of Government but whether there was a reasonable basis for the executive judgment underlying the loyalty program. As this Court declared in *Douds,* "the attempt to apply the term, 'clear and present danger' as a mechanical test in every case touching First Amendment freedoms, without regard to the context of its application, mistakes the form in which an idea was cast for the substance of the idea" (339 U. S. at 394). Cf. *Dennis* v. *United States,* 341 U. S. 494, 507–508. "When the effect of a statute or ordinance upon the exercise of First

Amendment freedoms is relatively small and the public interest to be protected is substantial, it is obvious that a rigid test requiring a showing of imminent danger to the security of the Nation is an absurdity" (*American Communications Assn.* v. *Douds, supra* at 397). Thus, in explaining the basis for its decision in *Public Workers,* which did not utilize the "clear and present danger" formula, the Court explained in *Douds* that "the rational connection between the prohibitions of the statute and its objects, the limited scope of the abridgment of First Amendment rights, and the large public interest in the efficiency of government service, which Congress has found necessitated the statute, led us to the conclusion that the statute may stand consistently with the First Amendment" (339 U. S. at 405). And, significantly, the more recent cases in this field such as *Garner* and *Adler* make no mention of the "clear and present danger" test.

What the argument as to remoteness of the danger comes down to is an assertion that the Government is powerless to protect itself from possible espionage and fifth column activities in aid of hostile foreign powers on the part of its employees until they occur and are discovered; that it must ignore the evidence that one of the techniques by which the Communist Party seeks to establish its dictatorship is the obtaining of every possible foothold in the government service; that it must wait until the Communists and

their dupes have become too powerful to be eradicated from that service before doing anything to eradicate them. Admittedly, the vast majority of Government employees are loyal and only a small number have been dismissed for doubtful loyalty, but that is not the point. Faced with a potential enemy whose asserted aim is world domination and the destruction of all civil liberties, the Government is not required to wait until war is declared or a coup d'état has begun. Cf. *Dennis* v. *United States*, 341 U. S. 509–51[illegible]. The President, we submit, is entitled to insist that all Government servants, like Caesar's wife, be above suspicion.

4. Last, objection is made to the alleged vagueness and uncertainty of the standards of the Loyalty Order. The contention seems to be that the Order permitted a broad inquiry into beliefs of every kind, including beliefs bearing no reasonable relation to the evil at which the President aimed, and, for that reason, was defective although a more narrowly drawn Order might have been valid.

Viewed—as it must be—as a measure to prevent possible conduct, the likelihood of which was to be determined on the basis of the activities and associations of the persons involved, Executive Order 9835, as amended, presents no serious question, we submit, on this score. Since it did not prohibit expression of views, there is no question

here of defining the precise range of the expressions prohibited. Moreover, it involved no criminal sanctions, and hence does not present the question whether the strict requirements of definiteness and certainty of a criminal statute were met. Indeed, as we have seen (*supra,* pp. 48–49, 84–85), the Order was in no sense punitive.

It may be assumed that, as a practical matter, the Order may have acted as a deterrent to employees in their exercise of First Amendment rights. "But even assuming some such deterrent effect, the restraint is at most an indirect one resulting from self-censorship * * *. The hazard of such restraint is too remote to require striking down a [regulation] which on its face is otherwise plainly within the area of [executive] power and is designed to safeguard a vital national interest." *United States* v. *Harriss,* 347 U. S. 612, 626. "Similarly, the Hatch Act probably deters some federal employees from political activity permitted by that statute, but yet was sustained because of the national interest in a nonpolitical civil service. *United Public Workers* v. *Mitchell,* 330 U. S. 75." *United States* v. *Harriss, supra* at 626, n. 17.

Further, measured by the standards traditionally applied in cases involving Government employment, the Order was certainly not deficient. As we have already shown, in the absence of legislation to the contrary, all inferior officers and

employees hold office at the pleasure of the appointing authority. To hold office at the will of a superior and to be removable therefrom only in accordance with definite standards are opposite and inherently conflicting ideas. That the President and Congress have attempted to restrict the discretion of administrative officials by laying down standards for removal does not mean that the rights thus conferred upon employees are raised to the status of Constitutional rights. And it may be noted that the standard laid down in the Lloyd-LaFollette Act, which has been in uncontested effect since 1912, is that removal shall be made only "for such cause as will promote the efficiency of the service." It has never been suggested that that standard is void for indefiniteness; yet, plainly, that legislative standard is no less broad than that specified in the Order, *i. e.*, "that, on all the evidence, there is a reasonable doubt as to the loyalty of the person involved to the Government of the United States." Indeed, as we have indicated, the standard of the Executive Order is merely one example of "such cause as will promote the efficiency of the service."[38]

To require a narrower test would be to ignore the essential nature of the problem. Inter-

[38] In the light of the attacks now made on it, it is interesting to compare the careful effort made in Executive Order 9835 to prescribe standards for dismissal with the extreme generality of President Wilson's order, set out *supra*, p. 71.

national Communism is, in many of its aspects, a secret and conspiratorial movement. It operates in the United States not only directly through the Communist Party of America and those who admit membership in it, but also through numerous front organizations and through individuals who endeavor to conceal their membership in or sympathetic association with the Party. "[D]isloyalty is screened by ideological patterns and techniques of disguise that make it difficult to identify." *Wieman* v. *Updegraff*, *supra*, at 188. Hence to secure direct and conclusive proof is often difficult and always time-consuming. For purposes of criminal prosecution, it is appropriate that the tests be drawn narrowly. The Government can and should be expected in criminal proceedings to bear a heavy burden of proof. And in general, criminal prosecution must await the commission of unlawful acts; it cannot anticipate them. Like considerations may be true as to general regulations applicable to private individuals or organizations. But in dealing with the federal service, the executive is not required to wait for proof; it may properly insist that government employees be above suspicion; it can—as the Order did—base dismissals upon "reasonable doubt" rather than incontrovertible proof. In regulating on that basis, it is, we submit, entirely appropriate to define the applicable standards in terms which

will allow resort to the kind of evidence and considerations which any reasonable man, faced with a like inquiry concerning his employees, would resort to. Cf. *Adler* v. *Board of Education*, *supra*, at 493; *Garner* v. *Board of Public Works*, *supra*, at 720. A narrower standard might have risked jeopardizing our national security by allowing to remain within federal service persons whose loyalty could not be relied on, and might have imposed an impossible administrative burden. The choice of methods was, we believe, for the President.

II

THE ACTION TAKEN BY RESPONDENTS HEREIN FULLY CONFORMED TO THE REQUIREMENTS OF EXECUTIVE ORDER 9835, AS AMENDED

Petitioner's argument that the procedure followed by respondents did not conform to the requirements of the Executive Order rests primarily on Part V of the Order, as amended, which prescribed that the standard for the refusal of employment shall be that "on all the evidence, there is a reasonable doubt as to the loyalty of the person involved to the Government of the United States."

Construing the word "evidence" in its judicial sense, petitioner contends that the findings of the Loyalty Boards were not based on "all the evidence." He points out that those who gave in-

formation against him did not appear at the hearing, were not identified to him, and that no opportunity for cross examination was afforded. The Loyalty Boards, he asserts, had no knowledge of the informants' identity,[39] no knowledge of the officials who certified the information as coming from reliable sources, and hence were not in a position to exercise their judgment in weighing the credibility of the confidential reports. Petitioner contends, therefore, that "all the evidence" before the Loyalty Boards, *i. e.*, the sworn statements of petitioner and witnesses and affiants in his behalf were favorable and supplied no ground for belief that petitioner's loyalty was reasonably in doubt.

Petitioner further points out that Part II, Section 2a, provides that "an officer or employee who is charged with being disloyal shall have a right to an administrative hearing." Petitioner urges that, in light of the preamble to the Order which states that both the United States and the accused employee must be afforded "maximum protection," the "administrative hearing" prescribed must mean a hearing which meets the minimum standards of due process.

Admittedly, the words "evidence" and "administrative hearing" have an established juris-

[39] Respondents' answer alleges that the identity of one or more, but not all, of these informants was known to the Boards (R. 18, 20).

prudential gloss. It does not follow, however, that they were employed as words of art in the Order. The issue presented is simply one of Presidential intention. In this instance, these words take their meaning from an analysis of the Order as a whole. Placed in context, we submit that these terms do not comprehend "the formal and litigious procedures" which petitioner's interpretation would attribute to them. Cf. *United States* v. *Nugent,* 346 U. S. 1, 7.

In accordance with the Directives of the Loyalty Review Board (5 C. F. R. (1949 Ed.) Parts 210, 220), petitioner was informed by interrogatory, by letter of charges, and by statement of information of the nature of the evidence against him, insofar as security considerations permitted (R. 4, 17–18), was advised of his right to reply to the charges in writing (R. 4) and his right to have a hearing before a Loyalty Board at which he might present evidence in his behalf (R. 4). Hearings were held before the Loyalty Board of the Department of Health, Education and Welfare and the Loyalty Review Board. Petitioner was represented by counsel of his choice and testified personally. All affidavits offered by him were accepted, and all witnesses presented by him testified (R. 18, 19, 20, 21). Read as a whole, the Order required no more.

When the words "all the evidence" are placed in their proper context, it is plain that they were

intended merely to mean all the information available to the Loyalty Boards. It is equally clear that the Order did not specify that "all the evidence" must be revealed to the accused employee at the hearing. Part I, Section 3, of the Order provided that investigation shall be made "at all available pertinent sources of information," including files of the Federal Bureau of Investigation, files of any other appropriate Government investigatory or intelligence agency, and files of the House Committee on Un-American Activities. Part IV required that the names of confidential informants not be revealed. Part II, Section 2b, stated that the nature of the charges shall be set forth as specifically as, in the discretion of the employing agency, security considerations permit. Moreover, on March 13, 1948, the President, by Directive, unequivocally directed that reports, records and files relating to the loyalty program be preserved in strict confidence. 13 F. R. 1359. It is apparent, therefore, that the "maximum protection" intended to be afforded employees was that protection consistent with the dictates of security. Petitioner's argument that "evidence" was employed in its judicial meaning—that all witnesses must appear, either in person or by affidavit, in the proceeding

and on the record—is conclusively and emphatically belied by the Executive Order.[40]

Considered in this frame of reference, the words "evidence" and "administrative hearing," even if they stood alone, could not have the meaning for which petitioner contends. But they did not stand alone. The accused employee's rights during the hearing were twice explicitly defined in the Executive Order. He had the right to appear before the Boards personally, to be accompanied by counsel of his choice, and to present evidence on his behalf, through witness or by affidavit. Part II, Sections 2a, 2b (Appendix, *infra*). No other rights normally incident to a quasi-judicial hearing were specified. Indeed, such rights could not have been conferred consistently with the Presidential mandate that the identity of confidential informants be kept secret.

That a quasi-judicial hearing was not intended is conclusively manifested in The Report of the

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[40] In this connection, it should be noted that Judge Edgerton's dissenting opinion in the *Bailey* case, *supra*, was mistaken insofar as he was of the belief that the regulations of the Loyalty Review Board prohibited the appearance of all witnesses for the Government (182 F. 2d at 68). As pointed out above, n. 17, the Board's regulations provided that all reasonable efforts were to be made to induce all identified non-confidential witnesses, adverse to the employee, to attend the hearing, testify in the employee's presence and subject themselves to cross examination. Since the Order did not grant the power of subpoena to the Loyalty Boards, witnesses could only be "invited."

President's Temporary Commission on Employee Loyalty (1947), which resulted in Executive Order 9835.[41] Paragraph 3c of Executive Order 9806, 11 F. R. 13863, which created the Temporary Commission, asked that body to recommend the procedure which should be established to guarantee a fair hearing. In language identical in substance to Part II, Section 2, of Executive Order 9835, which followed, the Commission recommended that (p. 36):

> An employee who is charged with being disloyal shall have a right to an administrative hearing before a Loyalty Board in the employing department or agency. He may appear personally, accompanied by counsel or representative of his own

[41] The Temporary Commission was established on November 25, 1946, by Executive Order 9806 (11 F. R. 13863). Its function was "to inquire into the standards, procedures, and the organizational provisions for (a) the investigation of persons who are now employed by the United States Government or are applicants for such employment, and (b) the removal or disqualification from employment of any disloyal or subversive person." The Commission was composed of representatives of the Departments of Justice, State, Treasury, War and Navy, and the Civil Service Commission. The Commission submitted specific recommendations for a revitalized Loyalty Program and suggested that its recommendations be effectuated by the promulgation of an Executive Order which would simultaneously provide for the abrogation of Executive Order 9300 (discussed *supra*, p. 77). Copies of the Commission's report were handed to appropriate members of Congress and were generally made available to the public. See *e. g.*, Corwin, *The President*, p. 432, n. 98.

> choice, with witnesses, and present any evidence, including affidavits, in his behalf. * * *

And, in explanation of this recommendation, the Temporary Commission stated (p. 29):

> Fair administrative process will provide an employee with the right to a hearing with counsel and witnesses, and even though he will not have the right of confrontation, he will have an opportunity to present his side of the case prior to adjudication.
>
> The action taken by a federal department or agency to remove an employee is administrative in character and a hearing conducted for such a purpose is an administrative hearing and not a judicial proceeding. * * *

Further, we think it significant, in ascertaining the President's intent in this connection, that dismissed Government employees have never been accorded a quasi-judicial hearing. As we have seen, the Lloyd-LaFollette Act, 5 U. S. C. 652, considered a landmark in civil service reform, requires no oral hearing whatever. And the Administrative Procedure Act, 5 U. S. C. 1001 *et seq.*, expressly excludes "the selection or tenure of an officer or employee of the United States other than examiners" from its hearing requirements (5 U. S. C. 1004). See Sen. Doc. No. 248, 79th Cong., 2d Sess., pp. 202, 260–261, 360.

It should also be noted that the Executive

Order was extensively criticized for failing to provide the procedure which petitioner here contends it did provide. Thus Professors Chafee, Griswold, Katz, and Scott, of the Harvard Law School, pointed out in a communication to the New York Times,[42] that

> There is no provision that the accused shall be confronted by such evidence as there may be * * * no requirement that the evidence against him shall be introduced at the hearing at all. * * * no requirement that the findings of the loyalty board must be supported by the evidence. In fact, there is no requirement that the loyalty board make any findings whatever.

See *e. g.*, to the same effect, Emerson and Helfeld, *Loyalty Among Government Employees,* 58 Yale L. J. 1, 101 ff. These criticisms were given earnest consideration by the then Chairman of the Loyalty Review Board, who, in a public statement, set forth in detail the reasons why such provisions could not, in his view, be adopted. See New York Times, December 28, 1947, p. 28, col. 2–6. As the court below cogently remarked in the *Bailey* case (182 F. 2d at 52): "If the Loyalty Boards were violating the President's instructions in so crucial a part of a program so widely publicized, he would surely have known it and

[42] New York Times, April 13, 1947, p. 8E, col. 5.

would have corrected the error."[43] Since the President failed to take such corrective action, we think it clear that the procedure followed by respondents fully conformed with the requirements of Executive Order 9835, as amended.[44]

Thus, the conformity between the requirements of Executive Order 9835 and the procedure followed here, and in the processing of all loyalty investigation cases, is clearly established by consideration of any of the traditional materials of legal analysis. Beyond this, a broad underlying

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[43] In this connection, it should also be observed that criticism of the provisions of the Executive Order was not confined to the pages of legal periodicals of limited circulation. In *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U. S. 123, four members of this Court expressed the view that, *inter alia*, Part III, Section 3, of the Order, which provided for the designation of organizations by the Attorney General, offended due process for want of a hearing. Further, Mr. Justice Frankfurter construed the Order as not precluding "an administrative procedure, however informal, which would incorporate the essentials of due process" (*Id.* at 172). Since no change in the listing procedure was made by President Truman or his Attorneys General as a result of this criticism, it can only be concluded that in this instance at least—putting to one side the question of the validity of the procedure—the administrative construction of the Order was not in error.

[44] "Since this involves an interpretation of an administrative regulation a court must necessarily look to the administrative construction of the regulation if the meaning of the words used is in doubt. * * * the ultimate criterion is the administrative interpretation, which becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation." *Bowles* v. *Seminole Rock Co.*, 325 U. S. 410, 413–414.

basis, applicable to the sweep of the problem posed by the case, fully validates these procedures.

Jealous concern for the protection of individual rights is, at all times, a central factor in every aspect of American life. And no elaborate demonstration is needed to remind this Court of the hard fact that the security of this country, or of any country constituting a part of the free world, requires not merely protection of its borders from external force but also protection within from subversive activities of widely varied types, including carefully controlled and disciplined use by an enemy of trusted public servants, actually disloyal or unreliable. In the past quarter century, country after country has learned this lesson to its great cost. See, *e. g.*, pp. 39–55 of Brief for Respondents in *Bailey* v. *Richardson,* No. 49, October Term, 1950.

The attainment of these two goals, to protect the individual while at the same time achieving effective implementation of a national security program, was the constant purpose of the loyalty program and the procedure utilized in that program. The elusive and complex aspects of this task have been as great as any which ever confronted a democratic government. Those members of the Executive Branch of the Government charged with the administration of President Truman's program, at all times aware of the magnitude of the responsibilities which they

faced, undertook to give, after much study, what they regarded as the maximum hearing process consistent with the paramount objective of the program—the protection of the Government from infiltration by persons whose loyalty was less than certain. We submit that, by virtue of their efforts, the program has been carried out in the fullest possible conformity with the basic Anglo-American tradition of individual liberty.[45]

Challenges to the program center on what we conceive to be an integral part of the effective processing of loyalty cases, the methods of investigation which yield information on questions of employee loyalty. Here again, it must be remembered that the purpose of the loyalty program was to erect a safeguard against damage to the national interest of a sort which, once it has oc-

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[45] The actual administration of the program, the safeguards provided, the regulations in protection of individual rights, are all in striking contrast to petitioner's apparent suggestion that the Government should have summarily dismissed employees without any hearing (Pet. Br. 10, 14–15). Petitioner argues that there would be "no objection to a complete repeal of all Civil Service protection of government employees" and that "the Constitution does not limit the power of the Executive summarily to terminate employment on secret information or for any other reason" (Pet. Br. 14–15). What petitioner is saying in effect is that every government employee with respect to whom available information led to charges and a loyalty hearing could have been—and should have been—summarily dismissed by the agency head, not on *grounds* but on mere suspicion. Had this kind of program been followed in the early years following the establishment of President Truman's loyalty pro-

curred, cannot be made whole or reached by conviction and punishment. Hence, to determine whether reasonable doubt as to loyalty exists, every piece of information, of whatever sort, which sheds any light on the issue must be gathered by investigative agencies, and as a matter of duty, turned over to the Boards, carefully selected,[46] which pass on particular cases after the

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gram under Executive Order No. 9835, many thousands of public employees would have been the victims of petitioner's gratuitously conceived method of dealing with the loyalty problem. It takes neither reference to the developments in that period or even any argument to be satisfied that had this kind of "loyalty purge" been followed, thousands of employees cleared under the Truman loyalty program and now performing useful public service, would have been victimized and every person leaving the Government in such circumstances would have done so under the cloud of the "loyalty purge," giving him the "badge of infamy" which petitioner decries. That this number is not negligible is demonstrated by the fact that, at the termination of the loyalty program in August 1953, the action of the loyalty boards had resulted in the clearance of 16,503 persons. In contrast, only 560 persons had been removed or denied employment on grounds relating to loyalty. See United States Civil Service Commission, 1953 Annual Report, p. 32, 29–31. Measured by the 4,756,705 individuals whose loyalty forms were checked during the period 1947–1953, these figures significantly show the care which was taken in the administration of the program to protect and safeguard individual rights.

[46] In the instant case, for example, the three members of the Loyalty Review Board panel who determined that there was a reasonable doubt as to petitioner's loyalty—John Harlan Amen, John H. Hessey, Sr., and Willard L. King—are seasoned and distinguished lawyers. See Who's Who in America, 1954–1955, pp. 57, 1210, 1468.

most careful examination and sifting of all available material.

The valid reasons for nondisclosure and the impact of any other course on the effectiveness of the various intelligence agencies of government is suggested in the statements of Chairman Richardson and F. B. I. Director Hoover in the published articles previously referred to. They emphasize what has been axiomatic in police and all other forms of government intelligence work, that certain necessary sources of delicate information do not survive disclosure. Informants, like eye witnesses to a crossing accident, must of necessity be the people who happen to be where the activity occurs. The natural human reluctance to become "involved" in any legal process is multiplied when dealing with the reliability of a person for public employment. The framers of President Truman's Executive Order 9835 were not unaware of this but they had to weigh the risks to the individual against the attainment of the legitimate objective of the Government. Informers must be judged on whether their contribution to the total government intelligence operations tends to protect the Government from sabotage, espionage and various forms of intrigue and subversion. No one contends that perfection exists in this sensitive and delicate area of human activity but its total efficiency and the need for its use can be appraised in part in comparing the widespread

sabotage of World War I (*e. g.*, Black Tom Explosion, etc.) and the total absence of known sabotage in World War II. A large area of vital government intelligence depends on undercover agents, paid informers, and casual informers who must be guaranteed anonymity. Thus, evidence which would be rejected under established legal doctrine in a criminal proceeding could well be the compelling reason for dismissal of an employee on loyalty grounds. An agency head or a loyalty board which would not give weight to information satisfactorily evaluated would be derelict in their respective duties.

Confidential information is necessarily gleaned from a wide variety of sources. In addition to information from confidential informants, a large percentage of the material included in the reports under the loyalty and security program is derived from the use of extremely delicate and confidential techniques. Information of a confidential character, both from individual informants and from the use of confidential techniques, is often developed in the course of espionage and sabotage investigation entirely apart from investigations under the loyalty and security program. Of necessity, the information thus developed as by-products of major espionage and sabotage investigations must be included, where relevant, in the investigative agency's reports on employee cases. Accordingly, disclosure of these

confidential sources of information and techniques of investigation would not only imperil the employee loyalty and security program but would also endanger the effective functioning of investigative agencies in the espionage and sabotage fields. Professional undercover agents of continuing utility not in one but in many cases and situations, casual informants in individual cases who would withhold information if confronted by the exigencies of appearing as witnesses in trials on the merits, highly confidential sources of information consisting of confidential government and non-government files, information obtained under a pledge of confidence—all these vital sources of information, and others, might well dry up, to the detriment of the basic security of the country, if petitioner's contention as to his overriding rights of confrontation and cross-examination were to be honored.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment below should be affirmed.

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APPENDIX

Executive Order 9835

Prescribing procedures for the administration of an employees loyalty program in the executive branch of the government

Whereas each employee of the Government of the United States is endowed with a measure of trusteeship over the democratic processes which are the heart and sinew of the United States; and

Whereas it is of vital importance that persons employed in the Federal service be of complete and unswerving loyalty to the United States; and

Whereas, although the loyalty of by far the overwhelming majority of all Government employees is beyond question, the presence within the Government service of any disloyal or subversive person constitutes a threat to our democratic processes; and

Whereas maximum protection must be afforded the United States against infiltration of disloyal persons into the ranks of its employees, and equal protection from unfounded accusations of disloyalty must be afforded the loyal employees of the Government:

Now, therefore, by virtue of the authority vested in me by the Constitution and statutes of the United States, including the Civil Service Act of 1883 (22 Stat. 403), as amended, and sec-

tion 9A of the act approved August 2, 1939 (18 U. S. C. 61i), and as President and Chief Executive of the United States, it is hereby, in the interest of the internal management of the Government, ordered as follows:

PART I.—INVESTIGATION OF APPLICANTS

1. There shall be a loyalty investigation of every person entering the civilian employment of any department or agency of the executive branch of the Federal Government.

a. Investigations of persons entering the competitive service shall be conducted by the Civil Service Commission, except in such cases as are covered by a special agreement between the Commission and any given department or agency.

b. Investigations of persons other than those entering the competitive service shall be conducted by the employing department or agency. Departments and agencies without investigative organizations shall utilize the investigative facilities of the Civil Service Commission.

2. The investigations of persons entering the employ of the executive branch may be conducted after any such person enters upon actual employment therein, but in any such case the appointment of such person shall be conditioned upon a favorable determination with respect to his loyalty.

a. Investigations of persons entering the competitive service shall be conducted as expeditiously as possible; provided, however, that if any such investigation is not

completed within 18 months from the date on which a person enters actual employment, the condition that his employment is subject to investigation shall expire, except in a case in which the Civil Service Commission has made an initial adjudication of disloyalty and the case continues to be active by reason of an appeal, and it shall then be the responsibility of the employing department or agency to conclude such investigation and make a final determination concerning the loyalty of such person.

3. An investigation shall be made of all applicants at all available pertinent sources of information and shall include reference to:

a. Federal Bureau of Investigation files.
b. Civil Service Commission files.
c. Military and naval intelligence files.
d. The files of any other appropriate government investigative or intelligence agency.
e. House Committee on un-American Activities files.
f. Local law-enforcement files at the place of residence and employment of the applicant, including municipal, county, and State law-enforcement files.
g. Schools and colleges attended by applicant.
h. Former employers of applicant.
i. References given by applicant.
j. Any other appropriate source.

4. Whenever derogatory information with respect to loyalty of an applicant is revealed a full field investigation shall be conducted. A full field investigation shall also be conducted of those applicants, or of applicants for particular posi-

tions, as may be designated by the head of the employing department or agency, such designations to be based on the determination by any such head of the best interests of national security.

PART II.—INVESTIGATION OF EMPLOYEES

1. The head of each department and agency in the executive branch of the Government shall be personally responsible for an effective program to assure that disloyal civilian officers or employees are not retained in employment in his department or agency.

a. He shall be responsible for prescribing and supervising the loyalty determination procedures of his department or agency, in accordance with the provisions of this order, which shall be considered as providing minimum requirements.

b. The head of a department or agency which does not have an investigative organization shall utilize the investigative facilities of the Civil Service Commission.

2. The head of each department and agency shall appoint one or more loyalty boards, each composed of not less than three representatives of the department or agency concerned, for the purpose of hearing loyalty cases arising within such department or agency and making recommendations with respect to the removal of any officer or employee of such department or agency on grounds relating to loyalty, and he shall prescribe regulations for the conduct of the proceedings before such boards.

a. An officer or employee who is charged with being disloyal shall have a right to an administrative hearing before a loyalty board in the employing department or agency. He may appear before such board personally, accompanied by counsel or representative of his own choosing, and present evidence on his own behalf, through witnesses or by affidavit.

b. The officer or employee shall be served with a written notice of such hearing in sufficient time, and shall be informed therein of the nature of the charges against him in sufficient detail, so that he will be enabled to prepare his defense. The charges shall be stated as specifically and completely as, in the discretion of the employing department or agency, security considerations permit, and the officer or employee shall be informed in the notice (1) of his right to reply to such charges in writing within a specified reasonable period of time, (2) of his right to an administrative hearing on such charges before a loyalty board, and (3) of his right to appear before such board personally, to be accompanied by counsel or representative of his own choosing, and to present evidence on his behalf, through witness or by affidavit.

3. A recommendation of removal by a loyalty board shall be subject to appeal by the officer or employee affected, prior to his removal, to the head of the employing department or agency or to such person or persons as may be designated by such head, under such regulations as may be prescribed by him, and the decision of the department or agency concerned shall be subject to ap-

peal to the Civil Service Commission's Loyalty Review Board, hereinafter provided for, for an advisory recommendation.

4. The rights of hearing, notice thereof, and appeal therefrom shall be accorded to every officer or employee prior to his removal on grounds of disloyalty, irrespective of tenure, or of manner, method, or nature of appointment, but the head of the employing department or agency may suspend any officer or employee at any time pending a determination with respect to loyalty.

5. The loyalty boards of the various departments and agencies shall furnish to the Loyalty Review Board, hereinafter provided for, such reports as may be requested concerning the operation of the loyalty program in any such department or agency.

PART III.—RESPONSIBILITIES OF CIVIL SERVICE COMMISSION

1. There shall be established in the Civil Service Commission a Loyalty Review Board of not less than three impartial persons, the members of which shall be officers or employees of the Commission.

a. The Board shall have authority to review cases involving persons recommended for dismissal on grounds relating to loyalty by the loyalty board of any department or agency and to make advisory recommendations thereon to the head of the employing department or agency. Such cases may be referred to the Board either by the employing department or agency, or by the officer or employee concerned.

b. The Board shall make rules and regulations, not inconsistent with the provisions of this order, deemed necessary to implement statutes and Executive orders relating to employee loyalty.

c. The Loyalty Review Board shall also:

(1) Advise all departments and agencies on all problems relating to employee loyalty.

(2) Disseminate information pertinent to employee loyalty programs.

(3) Coordinate the employee loyalty policies and procedures of the several departments and agencies.

(4) Make reports and submit recommendations to the Civil Service Commission for transmission to the President from time to time as may be necessary to the maintenance of the employee loyalty program.

2. There shall also be established and maintained in the Civil Service Commission a central master index covering all persons on whom loyalty investigations have been made by any department or agency since September 1, 1939. Such master index shall contain the name of each person investigated, adequate identifying information concerning each such person, and a reference to each department and agency which has conducted a loyalty investigation concerning the person involved.

a. All executive departments and agencies are directed to furnish to the Civil Service Commission all information appropriate for the establishment and maintenance of the central master index.

b. The reports and other investigative material and information developed by the

investigating department or agency shall be retained by such department or agency in each case.

3. The Loyalty Review Board shall currently be furnished by the Department of Justice the name of each foreign or domestic organization, association, movement, group or combination of persons which the Attorney General, after appropriate investigation and determination, designates as totalitarian, fascist, communist or subversive, or as having adopted a policy of advocating or approving the commission of acts of force or violence to deny others their rights under the Constitution of the United States, or as seeking to alter the form of government of the United States by unconstitutional means.

a. The Loyalty Review Board shall disseminate such information to all departments and agencies.

PART IV.—SECURITY MEASURES IN INVESTIGATIONS

1. At the request of the head of any department or agency of the executive branch an investigative agency shall make available to such head, personally, all investigative material and information collected by the investigative agency concerning any employee or prospective employee of the requesting department or agency, or shall make such material and information available to any officer or officers designated by such head and approved by the investigative agency.

2. Notwithstanding the foregoing requirement, however, the investigative agency may refuse to

disclose the names of confidential informants, provided it furnishes sufficient information about such informants on the basis of which the requesting department or agency can make an adequate evaluation of the information furnished by them, and provided it advises the requesting department or agency in writing that it is essential to the protection of the informants or to the investigation of other cases that the identity of the informants not be revealed. Investigative agencies shall not use this discretion to decline to reveal sources of information where such action is not essential.

3. Each department and agency of the executive branch should develop and maintain, for the collection and analysis of information relating to the loyalty of its employees and prospective employees, a staff specially trained in security techniques, and an effective security control system for protecting such information generally and for protecting confidential sources of such information particularly.

PART V.—STANDARDS

1. The standard for the refusal of employment or the removal from employment in an executive department or agency on grounds relating to loyalty shall be that, on all the evidence, reasonable grounds exist for belief that the person involved is disloyal to the Government of the United States.

2. Activities and associations of an applicant or employee which may be considered in connec-

tion with the determination of disloyalty may include one or more of the following:

a. Sabotage, espionage, or attempts or preparations therefor, or knowingly associating with spies or saboteurs;

b. Treason or sedition or advocacy thereof;

c. Advocacy of revolution or force or violence to alter the constitutional form of government of the United States;

d. Intentional, unauthorized disclosure to any person, under circumstances which may indicate disloyalty to the United States, of documents or information of a confidential or non-public character obtained by the person making the disclosure as a result of his employment by the Government of the United States;

e. Performing or attempting to perform his duties, or otherwise acting, so as to serve the interests of another government in preference to the interests of the United States.

f. Membership in, affiliation with or sympathetic association with any foreign or domestic organization, association, movement, group or combination of persons, designated by the Attorney General as totalitarian, fascist, communist, or subversive, or as having adopted a policy of advocating or approving the commission of acts of force or violence to deny other persons their rights under the Constitution of the United States or as seeking to alter the form of government of the United States by unconstitutional means.

PART VI.—MISCELLANEOUS

1. Each department and agency of the executive branch, to the extent that it has not already done so, shall submit, to the Federal Bureau of Investigation of the Department of Justice, either directly or through the Civil Service Commission, the names (and such other necessary identifying material as the Federal Bureau of Investigation may require) of all of its incumbent employees.

a. The Federal Bureau of Investigation shall check such names against its records of persons concerning whom there is substantial evidence of being within the purview of paragraph 2 of Part V hereof, and shall notify each department and agency of such information.

b. Upon receipt of the above-mentioned information from the Federal Bureau of Investigation, each department and agency shall make, or cause to be made by the Civil Service Commission, such investigation of those employees as the head of the department or agency shall deem advisable.

2. The Security Advisory Board of the State-War-Navy Coordinating Committee shall draft rules applicable to the handling and transmission of confidential documents and other documents and information which should not be publicly disclosed, and upon approval by the President such rules shall constitute the minimum standards for the handling and transmission of such documents and information, and shall be applicable to all departments and agencies of the executive branch.

3. The provisions of this order shall not be applicable to persons summarily removed under the provisions of section 3 of the act of December 17, 1942, 56 Stat. 1053, of the act of July 5, 1946, 60 Stat. 453, or of any other statute conferring the power of summary removal.

4. The Secretary of War and the Secretary of the Navy, and the Secretary of the Treasury with respect to the Coast Guard, are hereby directed to continue to enforce and maintain the highest standards of loyalty within the armed services, pursuant to the applicable statutes, the Articles of War, and the Articles for the Government of the Navy.

5. This order shall be effective immediately, but compliance with such of its provisions as require the expenditure of funds shall be deferred pending the appropriation of such funds.

6. Executive Order No. 9300 of February 5, 1943, is hereby revoked.

HARRY S. TRUMAN.

THE WHITE HOUSE,
March 21, 1947.

EXECUTIVE ORDER 10241

AMENDING EXECUTIVE ORDER NO. 9835 ENTITLED "PRESCRIBING PROCEDURES FOR THE ADMINISTRATION OF AN EMPLOYEES LOYALTY PROGRAM IN THE EXECUTIVE BRANCH OF THE GOVERNMENT"

By virtue of the authority vested in me by the Constitution and statutes of the United States, including the Civil Service Act of 1883 (22 Stat.

403) as amended, and section 9A of the act approved August 2, 1939 (5 U. S. C. 118j), and as President of the United States, it is ordered that paragraph 1 of Part V of Executive Order No. 9835 of March 21, 1947, entitled "Prescribing Procedures for the Administration of an Employees Loyalty Program in the Executive Branch of the Government", be, and it is hereby, amended to read as follows:

> "1. The standard for the refusal of employment or the removal from employment in an executive department or agency on grounds relating to loyalty shall be that, on all the evidence, there is a reasonable doubt as to the loyalty of the person involved to the Government of the United States."

HARRY S. TRUMAN.

THE WHITE HOUSE,
April 28, 1951.